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IN THE

# Supreme Court of the United States

JAMES H. BROWN,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether a trial court may prohibit a person from making public statements about the merits and fairness of highly publicized criminal charges brought against him, based only on a showing that there is a "substantial likelihood that comments from the . . . parties might well taint the jury pool."

2. Whether a trial court must explicitly consider whether less-restrictive alternatives would adequately protect the parties' right to a fair trial before imposing restrictions on speech.

3. Whether the gag order imposed on petitioner, which prohibits all speech that "could interfere with a fair trial or prejudice . . . the administration of justice," including all speech "intended to influence public opinion regarding . . . the merits of the case," is unconstitutionally overbroad.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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## PETITION FOR A WRIT OF CERTIORARI

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Petitioner James H. Brown respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

## OPINIONS BELOW

The opinion of the court of appeals (App. 1a-28a) is reported at 218 F.3d 415. The order of the court of appeals denying petitioner's petition for mandamus (App. 29a-34a) is not reported. The order of the district court (App. 35a-48a) denying petitioner's motion to vacate or modify the gag order is not reported.

## JURISDICTION

The judgment of the court of appeals was entered on July 6, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

## STATEMENT

The United States District Court for the Middle District of Louisiana has barred petitioner James H. Brown, the elected Insurance Commissioner of the State of Louisiana, from making public statements about the merits and fairness of highly publicized criminal charges pending against him involving actions he allegedly took in his official capacity. The charges are concededly a matter of great public interest to the voters of that state, to the legislators who oversee the Insurance Department and approve its budgets, and to the insurance companies Mr. Brown regulates. Mr. Brown contends that the gag order unreasonably restricts his ability to defend his personal and political reputation and effectively to perform his public duties, and that it violates his First Amendment right to free speech.

The Fifth Circuit's decision below upholding the district court's sweeping gag order implicates three distinct circuit splits. First, as the court of appeals acknowledged (App. 17a-19a), by holding that Mr. Brown could be prohibited from discussing his case based merely on a "showing of potential prejudice" to a fair trial (*id.* at 21a), the decision joined a long-standing circuit split concerning the appropriate standard of proof necessary to restrict the speech of parties to litigation. *See* Erwin Chemerinsky, *Silence is Not Golden: Protecting Lawyer Speech Under the First Amendment*, First Amendment Handbook 1089, 1107 (James L. Swanson, ed.

1999) ("In the absence of guidance from the Supreme Court, lower courts have adopted several different standards for when gag orders on . . . parties are constitutionally permitted."). Three Justices have noted "the conflicting resolutions given to [this issue] by the Courts of Appeals," and written that plenary review should be granted "[b]ecause of [its] importance . . . ." *Dow Jones & Co. v. Simon*, 488 U.S. 946, 948 (1988) (White J., joined by Brennan and Marshall, JJ., dissenting from denial of certiorari). Review is also warranted because the permissive standard adopted by the court of appeals is fundamentally inconsistent with this Court's precedents holding that gag orders are subject to a "heavy burden of showing justification" (*Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539, 558 (1976) (internal quotation omitted)) appropriate to the "least tolerable infringement on First Amendment rights." *Id.* at 559.

Second, in holding that a trial court need not explicitly consider less-restrictive alternatives before ordering criminal defendants gagged (App. 26a), the Fifth Circuit adopted a position that conflicts with decisions of the Second, Third, Sixth, and Ninth Circuits,[1] and that is directly at odds with this Court's determination that similar restrictions on First Amendment rights can be made "*only* if specific findings are made demonstrating that . . . reasonable alternatives . . . cannot adequately protect the defendant's fair trial rights." *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 14 (1986) (emphasis added).

Finally, the gag order is facially overbroad, prohibiting any speech that "*could* interfere with a fair trial" or "prejudice . . . the government" (App. 51a) no matter how unlikely it is to do so. The Fifth Circuit's decision upholding

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[1] *United States v. Salameh*, 992 F.2d 445, 447 (2d Cir. 1993); *Bailey v. Systems Innovation, Inc.*, 852 F.2d 93, 99 (3d Cir. 1988); *United States v. Ford*, 830 F.2d 596, 600 (6th Cir. 1987); *CBS, Inc. v. U.S. District Court*, 729 F.2d 1174, 1183 (9th Cir. 1983).

this order directly conflicts with decisions of the Second, Seventh and Ninth Circuits requiring that gag orders be drawn "so as not to prohibit speech which will not have an effect on the fair administration of justice along with speech which will have such an effect." *Chase v. Robson*, 435 F.2d 1059, 1061 (7th Cir. 1970); *accord United States v. Salameh*, 992 F.2d 445, 447 (2d Cir. 1993); *Levine v. U.S. District Court*, 764 F.2d 590, 599 (9th Cir. 1985).

**A. Background and Prior Proceedings**

Since 1992, petitioner James H. Brown has served as the elected Insurance Commissioner for the State of Louisiana. On September 24, 1999, five weeks before a primary in which he was a candidate for reelection, Brown was indicted in the Middle District of Louisiana. The indictment charged six defendants, including former Governor Edwin Edwards, with 43 counts of conspiracy, wire and mail fraud, insurance fraud and witness tampering, all relating to allegations that the estate of a failed insurance company had settled civil claims against its former owner on terms unduly favorable to him. Mr. Brown was also charged with 13 false statement counts, all arising from a single interview by FBI agents.

Within minutes of the return of the indictment, the district judge assigned the case *sua sponte* entered a gag order restricting public statements by parties, attorneys, and witnesses. App. 50a-52a. Four days later, following public protests that the gag order would prevent candidates in the impending primary from discussing what had naturally become the major issue in the campaign, the district judge *sua sponte* vacated the order.

Because the indictment charged a statewide elected official and a controversial former governor with criminal offenses, it immediately received "enormous local and

*national publicity.*"[2] App. 23a. News accounts prominently featured quotes from government wiretap recordings made at Edwards' home and law office, which were drawn from the detailed, 47-page indictment highlighting portions of the recordings most favorable to the government's case.[3] Over the next few weeks, the guilty pleas of two co-defendants generated additional lead-story publicity. Media accounts were dominated by allegations contained in the government's detailed "factual bases" filed with the guilty pleas, which recited that one of the co-defendants had been offered "bribes" by former Governor Edwards and felt "threatened" by actions of Edwards, Brown, and other defendants.[4]

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[2] *See, e.g.*, Ed Anderson, *Insurance chief might be on last legs as elective office; Legislature can give choice to governor*, New Orleans Times-Picayune, Sept. 25, 1999, at A8; Manuel Roig-Franzia, *Insurance indictment snags Brown, Edwards; Four others accused in Cascade liquidation*, Times-Picayune, Sept. 25, 1999, at A1; William Pack, *Lawyer: Cascade deal low, Ex-special master recounts investigation*, The Advocate, Sept. 30, 1999, at 1B, 2B; Manuel Roig-Franzia, *Insurance fraud case a legal maze*, Times-Picayune, Sept. 26, 1999, at A1; Scot J. Paltrow, *Bad Policies? Down in Louisiana, Insurance Regulation Carries a Strange Risk*, Wall St. J., Nov. 19, 1999, at A1, A6; *Louisiana Ex-governor Is Indicted Again*, N.Y. Times, Sept. 25, 1999, at A11; Natalie Gott, *Louisiana's Edwards indicted again*, Wash. Times, Sept. 25, 1999, at A1, A4; Michael Bradford, *Commissioner facing charges*, Bus. Ins., Oct. 4, 1999, at 1, 77; *Louisiana insurance official indicted*, J. of Commerce, Sept. 29, 1999, at 8; Alex Maurice, *Feds Indict La. Commissioner*, Nat'l Underwriter Property & Casualty, Oct. 4, 1999. In addition to substantial print coverage, the indictment was the subject of numerous radio and television broadcasts.

[3] *See, e.g.*, Roig-Franzia, *Insurance indictment snags Brown*, *supra* note 2, at A1; *see also* Pet. C.A. Record Excerpts Tab 1 (original indictment).

[4] *See, e.g.*, Manual Roig-Franzia, *Judge Admits Insurance Conspiracy; Sanders Names Brown, Edwards*, Times-Picayune, Oct. 2, 1999, at A1; William Pack and Christopher Baughman, *Ex-Judge Sanders pleads guilty: Testimony to aid case against Edwards, Brown*, The Advocate, Oct. 2, 1999, at A1; William Pack, *Sanders plea hits accused*, The Advocate, Oct. 3, 1999, 1B; *Judge reaches plea agreement,*

Indeed, both of the factual bases were published in their entirety in the Baton Rouge newspaper.[5] Considerable attention was also given to statements by the U.S. Attorney at press conferences that (as with the indictment) accompanied the events. The indictment and related pleas were voted the top news story of 1999 by the Baton Rouge newspaper, and a national insurance-industry newspaper reported Brown's indictment as the top "newsmaker" of 1999.[6]

Shortly after the district court lifted the gag order, Edwin Edwards released to the press excerpts of transcripts of three wiretapped conversations that contradicted claims made in the indictment. This release was the subject of a handful of news articles in early October 1999.[7] The district court responded by promptly imposing an order restricting the parties, lawyers, and witnesses from releasing to the news media wiretap tapes or transcripts of those tapes and any

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*will testify against commissioner*, Bus. Ins., Oct. 11, 1999, at 1; *Volz: "One link goes, and the rest of the chain gets weaker,"* Associated Press, Oct. 2, 1999; William Pack and Christopher Baughman, *Official pleads guilty*, The Advocate, Oct. 14, 1999, at 1A, 4A; Steve Ritea, *Cascade defendant cops plea*, Times-Picayune, Oct. 14, 1999, at A1, A14; Natalie Gott, *Another defendant pleads guilty in Cascade case*, Associated Press State & Local Wire, Oct. 14, 1999.

[5] *Factual basis*, The Advocate, Oct. 2, 1999, at 4A; *Factual basis in Robert Bourgeois plea*, The Advocate, Oct. 14, 1999, at 21A.

[6] *Top 10 stories of 1999*, The Advocate, Dec. 26, 1999 at 2B; *10 who made news throughout '99*, Bus. Ins., Dec. 20, 1999, at 32.

[7] Manuel Roig-Franzia, *Edwards, Brown plead innocent in fraud case*, Times-Picayune, Oct. 5, 1999, at A1; *Transcript Excerpts*, Times-Picayune, Oct. 5, 1999, at A3; Natalie Gott, *Edwards, Brown, others plea* [sic] *innocent in Cascade case*, Associated Press State & Local Wire, Oct. 5, 1999. Both the court of appeals and district court incorrectly state that an unidentified defendant "conducted interviews while playing the recordings." App. 3a, 22a, 43a. In fact, there is no evidence that any person played the recordings to any member of the media.

"materials or documents subject to discovery in this case." App. 53a-55a. No party has ever challenged that order.

During the election campaign – in which Mr. Brown's leading opponent was an acknowledged government witness – the indictment was the most-discussed issue.[8] Challengers ran advertisements highlighting the indictment and branding Mr. Brown a criminal. Mr. Brown, temporarily free of the gag order, defended himself by denying the charges and questioning the motives of the prosecutors in bringing the indictment – after an almost three-year investigation – in the middle of the election campaign. In one much-quoted remark, Mr. Brown stated that he was an innocent bystander caught up in the U.S. Attorney's repeated efforts to prosecute former Governor Edwards, making him the victim of "the political equivalent of a drive-by shooting." *See Insurance indictment snags Brown*, *supra* note 2, at A1.

On November 18, 1999 – seven months before the then-scheduled trial date – the district judge reentered the gag order *sua sponte*, effective when the polls closed two days later.[9] App. 49a. The gag order provides that parties, counsel, and witnesses shall not give or authorize any statement to the news media (or that "a reasonable person would expect to be communicated to" the news media) "relating to the trial, the parties or issues in the case" that "could interfere with a fair trial or prejudice any defendant, the government, or the administration of justice." *Id.* at 51a. The order further provides that "[s]tatements or information intended to influence public opinion regarding the merits of this case are specifically designated as information which could prejudice a party." *Id.* The order does not prohibit

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[8] Natalie Gott, *Indictment focus of insurance commissioner campaign*, Associated Press State & Local Wire, Oct. 15, 1999; Jack Wardlaw, *Brown: From Front-Runner To Struggler*, Times-Picayune, Oct. 13, 1999, at B7.

[9] Mr. Brown was re-elected to a third four-year term.

"[s]tating, without elaboration or any kind of characterization whatsoever: (a) the general nature of an allegation or defense made in this case, (b) information contained in the public record of this case, (c) scheduling information; [or] (d) any decision made or order issued by the Court which is a matter of public record." *Id.*

While Mr. Brown did not object to the application of the gag order to *counsel*, he objected to its application to himself. App. 4a; *id.* at 37a n.10. Accordingly, on December 1, 1999, Mr. Brown filed a motion to vacate or modify the gag order. After Mr. Brown twice requested an expedited ruling, the court held a hearing on January 4, 2000. At that hearing, Mr. Brown introduced evidence from an insurance industry representative stating that reporting on the indictment had "had a chilling effect on insurance industry attitudes toward the Louisiana insurance market" and stating that "it is important that Commissioner Brown be allowed to communicate with the insurance industry about these indictments" in order for him "to properly regulate the insurance industry for the benefit of Louisiana citizens." Pet. C.A. App. Tab 16. The court solicited suggested modifications to the order, which were filed the next day. Mr. Brown proposed that the substance of the order remain intact, but that it apply only to counsel and not to defendants or witnesses; his proposal left in place all restrictions on the dissemination of wiretap tapes or transcripts and discovery materials. Pet. C.A. App. Tab 17. The government contended that the existing order should not be changed, but if modified, it should, *inter alia*, explicitly forbid defendants from "comment[ing] on the character, credibility, or motives of the Government." Pet. C.A. App. Tab 18.

**B. The District Court's Ruling**

After a month-long delay, the district court denied Mr. Brown's motion to vacate or modify the gag order on February 3, 2000. App. 35a-48a. Specifically noting that the

Fourth, Sixth, Ninth and Tenth Circuits were "in disagreement about whether a strict 'clear and present danger' standard . . . [or] a lower 'reasonable likelihood of prejudice' standard should be applied" to assess the constitutionality of gag orders on defendants (*id.* at 40a n.21), the court held that public statements by the defendants constituted a "clear and present danger" to a fair trial in this case and two related cases in the district involving Edwin Edwards (one of which was then ongoing, and a second now scheduled for trial in 2001).[10] *Id.* at 41a. Although the three cases have only a single person in common and concern very different facts, the court concluded that allowing "unrestricted comments about the merits of this trial" would create a "great risk of prejudice to the jur[ies]" in all three cases. *Id.* at 43a. Without mentioning the alternatives to speech restrictions proposed by Mr. Brown (such as searching voir dire and emphatic jury instructions), the district court stated that the gag order was narrowly tailored because it included within its sweep only those statements that were designed to "influence public opinion" or that "would interfere with 'the administration of justice.'" *Id.* at 46a. (In fact, the gag order prohibited any statement that *could* interfere with the administration of justice. *Id.* at 51a.)

### C. Fifth Circuit Denial of Mandamus

Mr. Brown simultaneously appealed and petitioned the court of appeals for a writ of mandamus. On February 21, 2000, a divided panel of the court of appeals denied the petition for writ of mandamus on two grounds. App. 29a-

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[10] The first case, *United States v. Edwin Edwards et al.*, No. 3:98 CR00165 (M.D. La.), ended on May 9, 2000 with the conviction of Edwards and four others and the acquittal of other defendants. The second, *United States v. Cecil Brown* et al., No. 3:99 CR00171 (M.D. La.), is scheduled for trial in January 2001. Edwards is not charged in the latter case. None of the other defendants in the instant case is charged or implicated in either the *Edwards* or *Cecil Brown* cases.

31a. First, the majority noted that Mr. Brown had an adequate remedy through appeal; second, the majority summarily concluded that "the requisite clear and indisputable abuse of discretion is *not* present." *Id.* at 30a.

Judge Parker dissented, stating that "the order violates the Constitution's prohibition on prior restraints of speech." App. 31a. Noting that "the government has already tilted the scales in its favor" (*id.* at 34a) with "well-publicized allegations against Brown, aided in large part by the government's release of sensitive wire tap material and various public announcements regarding the 'factual basis'" for guilty pleas (*id.* at 31a), Judge Parker wrote that "Brown's 'interest in replying to the charges and the associated adverse publicity . . . is at its peak' because the full spotlight of media attention along with the full weight of the government is upon him . . . ." *Id.* at 32a (quoting *United States v. Ford*, 830 F.2d 596, 599 (6th Cir. 1987) (alteration in original)). "Brown's status as an elected official provides further justification" for permitting public response, because the inability to defend the integrity of the office "dramatically [a]ffects a public official's ability to perform his duties to the public." *Id.* at 33a. Although the district court had "a number of alternative[s] available" to protect the jury pool, including "trial postponement, probing *voir dire*, [and] emphatic jury charges," the district court "'merely imposed the most draconian remedy possible – a direct prior restraint.'" *Id.* at 33a n.1 (quoting *Bailey v. Systems Innovation, Inc.*, 852 F.2d 93, 98-99 (3d Cir. 1988)). Finally, Judge Parker wrote that "Brown's hands are tied" by an overbroad gag order that "effectively limits his public comments" to bare denials of guilt. *Id.* at 34a.

### D. Fifth Circuit Affirmance of Gag Order

A different panel of the court then heard argument on Mr. Brown's appeal. Although acknowledging that this case "presents a somewhat close call" (App. 11a), the panel

affirmed.[11] Recognizing the division between the circuits on the issue of whether to apply the "clear and present danger" test or the "substantial likelihood" standard (*id.* at 17a-19a), the court opted for the latter ("a lesser showing of potential prejudice" (*id.* at 21a)). The court reasoned that the higher standard should be reserved for gag orders involving the media, which it viewed as entitled to extra protection as "the public's 'eyes and ears' into the criminal justice system." *Id.* at 19a. The court relied on *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1060 (1991), in which this Court upheld a state bar rule prohibiting lawyers from making statements that "will have a substantial likelihood of materially prejudicing" a case. *Id.* at 19a. Although noting that lawyers, unlike defendants, are subject to "ethical obligations to refrain from making prejudicial comments" (*id.* at 20a), the court found the same "substantial likelihood" standard should apply to gag orders binding defendants because, like lawyers, they are privy to nonpublic information that could be prejudicial if disclosed.

The court concluded that there was a "reasonable basis for the district court's concern" (App. 23a) that in light of the government and defendants' apparent willingness to "try the case in the press" (*id.*), there was a "substantial likelihood that comments from the lawyers[12] and parties *might well* taint the jury pool, either in the present case or one of the two related cases." *Id.* at 11a (emphasis added). The court did not acknowledge or discuss the concern, raised by petitioner and emphasized by Judge Parker's dissent, that the gag order effectively "tilted the scales" against petition by barring

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[11] The Fifth Circuit held that it had jurisdiction over the case, noting that "this Court and other Courts of Appeals have repeatedly held . . . that gag orders . . . are appealable under the collateral order doctrine." App. 9a (collecting cases).

[12] None of the parties has objected to application of the gag order to attorneys in this case. *See* App. 4a.

effective public response to the massive publicity surrounding the government's ongoing filing of allegations.

Although acknowledging that "the order is arguably somewhat broad" (App. 25a), and noting the "shortcoming" that the "district court did not on the record explicitly discuss and reject" less-restrictive alternatives before ordering the defendant gagged (*id.* at 26a), the court concluded that the order was narrowly tailored. Recognizing that the circuits were divided about whether a trial court must explicitly consider less-restrictive alternatives before restraining the speech of trial participants (*id.*), the court of appeals again opted for the more speech-restrictive approach, stating that the making of explicit findings was merely "good judicial practice." *Id.* Without the benefit of the district court's views on the various alternatives to gagging trial participants, the court of appeals addressed them in only general terms, rejecting them all on the grounds they carried "significant costs without addressing the root cause of the district court's concern." *Id.* at 27a.

**E. Continuing Press Coverage of the Case**

During the pendency of this appeal, the case has continued to be the subject of heavy press coverage. Because the gag order restricts commentary by the parties and their lawyers, the focus of press accounts has been on the government's detailed allegations. Recent publicity has focused on the allegations set forth in two superseding indictments.[13] Additional headlines were made in July 2000 when a co-defendant entered into a plea bargain. Again,

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[13] *See, e.g.*, Brett Barrouquere, *Indictment: Edwards tried bribery*, The Advocate, June 9, 2000, at 1B, 2B; Brett Barrouquere, *EWE, co-defendants arraigned*, The Advocate, June 24, 2000, at 1B, 2B; Natalie Gott, *More charges filed in insurance case*, Associated Press, June 8, 2000; *Briefing Book*, Times-Picayune, June 18, 2000, at A5; Brett Barrouquere, *New indictment adds allegations*, The Advocate, July 28, 2000 at 1A.

news accounts focused on the government's factual basis accompanying the guilty plea, which contained detailed allegations about Mr. Brown's conduct.[14]

## REASONS FOR GRANTING THE PETITION

The Fifth Circuit's decision below upholds a sweeping prior restraint on speech prohibiting a public official from commenting on his own criminal prosecution – a matter of undeniably great public interest directly relevant to the performance of his official duties – based merely on a showing that there was a "substantial likelihood" that public commentary would prejudice the court's ability to conduct a fair trial (App. 19a) and without so much as an on-the-record review of alternative measures not restrictive of speech. That decision deepens three distinct circuit conflicts of fundamental First Amendment importance.

These recurrent conflicts are particularly important in light of the increasing "trend towards gagging trial participants' speech." Erwin Chemerinsky, *The Sound of Silence: Reflections on the Use of the Gag Order*, 17 Loy. L.A. Ent. L.J. 311, 312 (1997); *see also Davenport v. Garcia*, 834 S.W.2d 4, 11 n.20 (Tex. 1992) (noting "increase in the number of gag orders on parties to ongoing litigation"). Further review is warranted.[15]

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[14] *See, e.g.*, Manuel Roig-Franzia, *Edwards Co-Defendant Cops Plea*, Times-Picayune, July 22, 2000, at A1; Brett Barrouquere, *Cascade figure pleads guilty*, The Advocate, July 22, 2000, at 1A; *Edwards co-defendant to testify for state*, Atlanta J.-Constitution, July 22, 2000, at 8A.

[15] Trial is scheduled to begin September 18, 2000, and is expected to last 4-5 weeks. Although the gag order will no longer apply after "the final verdict in this case" (App. 50a), a verdict will not moot this case. This Court explicitly has held that it has jurisdiction to review limited-duration gag orders as matters "'capable of repetition, yet evading review.'" *Nebraska Press Ass'n.*, 427 U.S. at 546. Such "orders are by nature short-lived" (*id.* at 547), but are capable of repetition because a

## I. THE FIFTH CIRCUIT'S DECISION CEMENTS A CIRCUIT SPLIT ON A BASIC ISSUE OF FIRST AMENDMENT LAW AND IS FUNDAMENTALLY INCONSISTENT WITH THIS COURT'S PRECEDENTS

### A. The Circuits Are Divided

As recognized by both courts and the government below, the courts of appeals are sharply divided on the showing necessary to impose restrictions on the extrajudicial speech of criminal defendants and witnesses. *See* App. 17a-18a ("Our sister circuits have not reached a consensus on this question."); *id.* at 40a ("[t]he lower courts are in disagreement" about standard to be applied); Gov't C.A. Br. 25 (noting "conflict" among circuits with "divergent views about trial courts' powers" to restrict "trial participants[']' extrajudicial publicizing").

By adopting a "substantial likelihood" standard, the Fifth Circuit aligned itself with the Second, Fourth, and Tenth Circuits, which "have held that a trial court may restrict extrajudicial comments by trial participants, including lawyers, parties, and witnesses, based on a determination that those comments present a 'reasonable likelihood' of prejudicing a fair trial." App. 18a. The Second Circuit adopted this position in *In re Dow Jones & Co.*, 842 F.2d 603, *cert. denied*, 488 U.S. 946 (1988), involving a challenge by several media groups to a court order restricting statements by parties and counsel in the Wedtech fraud case. The Second Circuit held that "the standard by which to measure justification" for restraints on trial-participants' speech "is whether there is a 'reasonable likelihood' that

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defendant might again be subject to such an order after the vacatur of a conviction by an appellate court or during a subsequent case. *Id.* at 546-47; *accord Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 6 (1986).

pretrial publicity [stemming from such statements] will prejudice a fair trial." *Id.* at 610.

The Fourth Circuit has taken the same view, holding in *In re Russell*, 726 F.2d 1007, *cert. denied*, 469 U.S. 837 (1984), that potential witnesses to a criminal case may constitutionally be prevented from making extrajudicial statements about their testimony, based on a showing that "there was a reasonable likelihood that the defendants would be denied a fair trial without proscribing certain of [their] extrajudicial statements." *Id.* at 1010. The Tenth Circuit similarly held in *United States v. Tijerina*, 412 F.2d 661, *cert. denied*, 396 U.S. 990 (1969), that an order prohibiting extrajudicial statements against lawyers, defendants, and witnesses was constitutional if based upon a showing that there was a "'reasonable likelihood' of prejudicial news which would make difficult the impaneling of an impartial jury and tend to prevent a fair trial." *Id.* at 666.

This position has also been adopted by several state courts of last resort. *See, e.g.*, *Sioux Falls Argus Leader v. Miller*, 610 N.W.2d 76, 86 (S.D. 2000) (per curiam) ("reasonable likelihood"); *State ex rel. The Missoulian v. Montana 21st Dist. Court*, 933 P.2d 829, 841-42 (Mont. 1997) ("substantial probability").

In contrast, the Third, Sixth, Seventh, and Ninth Circuits "have applied more stringent tests, requiring either a showing of 'clear and present danger' or 'serious and imminent threat' of prejudicing a fair trial." App. 18a. The Sixth Circuit's leading decision, *United States v. Ford*, 830 F.2d 596 (1987), involved the criminal prosecution of a sitting Member of Congress. Rejecting the government's suggestion that the extrajudicial speech of individuals – including defendants – should be subject to less protection than that of the press (*see id.* at 598 (citing *Pell v. Procunier*, 417 U.S. 817, 834-35 (1974)), the court held that extrajudicial statements must be shown to constitute a "clear

and present danger" to a fair trial before a trial court may impose "restraint[s] on a defendant in a criminal trial." *Id.* at 600. To justify such a restraint, the "threat must be specific, not general. It must be much more than a possibility or a 'reasonable likelihood' in the future. It must be a 'serious and imminent threat' of a specific nature . . . ." *Id.* The court reasoned:

> A criminal defendant awaiting trial in a controversial case has the full power of the government arrayed against him and the full spotlight of media attention focused upon him.
>
> The defendant's interest in replying to the charges and to the associated adverse publicity, thus, is at a peak. So is the public's interest in the proper functioning of the judicial machinery. The "accused has a First Amendment right to reply publicly to the prosecutor's charges, and the public has a right to hear that reply, because of its ongoing concern for the integrity of the criminal justice system and the need to hear from those most directly affected by it."

*Id.* at 599 (quoting Monroe H. Freedman and Janet Starwood, *Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys: Ratio Decidendi v. Obiter Dictum*, 29 Stan. L. Rev. 607, 618 (1977)). *See also CBS, Inc. v. Young*, 522 F.2d 234 (6th Cir. 1975) (applying "clear and present danger" test to gag order in civil suit).

The Seventh Circuit likewise rejected the "reasonable likelihood" standard in *Chase v. Robson*, 435 F.2d 1059 (1970) (per curiam). In that case, the court vacated a no-comment order against attorneys and defendants, writing that "before a trial court can limit defendants' and their attorneys' exercise of first amendment rights of freedom of speech, the record must contain sufficient specific findings by the trial court establishing that defendants' and their attorneys' conduct is 'a serious and imminent threat to the

administration of justice.'" *Id.* at 1061. The Seventh Circuit reaffirmed this ruling in *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (1975) ("Only those comments that pose a 'serious and imminent threat' of interference with the fair administration of justice can be constitutionally proscribed."), *cert. denied*, 427 U.S. 912 (1976). The *Bauer* court noted that defense statements were necessary to counteract prejudicial publicity surrounding government charging documents, which causes "the scales of justice in the eyes of the public [to be] weighed extraordinarily heavy against an accused." *Id.* at 250; *see also In re Oliver*, 452 F.2d 111, 114 (7th Cir. 1971).

In *Levine v. U.S. District Court*, 764 F.2d 590 (1985), the Ninth Circuit held that orders restricting statements by "trial participants" are permissible only if the proponent of the order establishes that such statements "pos[e] either a clear and present danger or a serious and imminent threat" to the right to a fair trial. *Id.* at 595. The court emphasized that "trial participants do not lose their constitutional rights at the courthouse door." *Id.*

The Third Circuit also rejected the proposition that a showing of potential prejudice is sufficient to support restrictions on trial participants' speech. In *Bailey v. Systems Innovation, Inc.*, 852 F.2d 93 (1988), that court vacated an order restricting the speech of defendants in a *civil* case, there as here state government officials. Noting that "a public official has the right and . . . sometimes the duty, to address issues of public concern," it held that the fact that government official defendants' public statements about the litigation "*could potentially* interfere with a fair trial do[es] not justify imposing restrictions on that official's speech unless there is a *clear threat* to [that] right." *Id.* at 100 (emphasis added).

Comparable standards have been adopted by several state courts of last resort. *See, e.g.*, *Breiner v. Takao*, 835 P.2d

637, 641 (Haw. 1992) ("serious and imminent"); *Kemner v. Monsanto Co.*, 492 N.E.2d 1327, 1337 (Ill. 1986) (same).

Over a decade ago, three Members of this Court wrote that the division of authority on this important issue warranted plenary review. *Dow Jones & Co. v. Simon*, 488 U.S. 946, 948 (1988) (White J., joined by Brennan and Marshall, JJ., dissenting from denial of certiorari). Since then, the conflict has only grown more pronounced as additional state and federal courts have weighed in on either side of the split, resulting in a "confusing split of federal authority" (*Davenport*, 834 S.W.2d at 11 n.20) that has been decried by both courts and legal commentators. *See, e.g.*, *News-Journal Corp. v. Foxman*, 939 F.2d 1499, 1515 n.18 (11th Cir. 1991) ("We . . . are cognizant of the division in circuit authority regarding the appropriate standard for evaluating restrictive orders imposed on trial participants."); *United States v. Hill*, 893 F. Supp. 1039, 1040-41 & n.1 (N.D. Fla. 1994); *Davenport*, 834 S.W.2d at 10; *Kemner*, 492 N.E.2d at 1336; Gerald T. Wetherington et al., *Preparing for the High Profile Case: An Omnibus Treatment for Judges and Lawyers*, 51 Fla. L. Rev. 425, 463 & nn.219-221 (1999) (noting "[t]here is disagreement among courts" about whether "reasonable likelihood" or "clear and present danger" analysis applies).[16]

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[16] *See also* Chemerinsky, *Sound of Silence*, 17 Loy. L.A. Ent. L.J. at 316; Lester Porter, Jr., Note, *Leaving Your Speech Rights at the Bar*, 67 Wash. L. Rev. 733, 739 (1992) ("[t]he circuit courts have wrestled with two standards in deciding when the danger of prejudice is grave enough to justify suppressing trial participants' speech"); Robert S. Stephen, Note, *Prejudicial Publicity Surrounding a Criminal Trial*, 26 Suffolk U. L. Rev. 1063, 1084 n.134 (1992) ("Circuits disagree about the appropriate standard that a movant must meet before a court will issue an order to restrain trial participants' speech."); Mark R. Stabile, Note, *Free Press-Fair Trial: Can They Be Reconciled in a Highly Publicized Criminal Case*, 79 Geo. L.J. 337, 346 (1990) (the "lack of clear guidance" from the Supreme Court on the proper standard for evaluating "gag orders on trial participants" has "caused a conflict to arise in the

This split of authority creates uncertainty about the proper standard to apply at a time when trial courts are increasingly likely to resort to speech restrictions on litigants to control pretrial publicity. *Davenport*, 834 S.W.2d at 11 n.20. As one noted constitutional scholar recently observed, "[t]his uncertainty is likely to remain until the Supreme Court addresses the issue and articulates a standard." Chemerinsky, *Silence is Not Golden*, *supra* at 1112.

### B. The Fifth Circuit's Permissive Standard Inadequately Protects Speech

Review is also warranted because the "substantial likelihood" standard adopted by the Fifth Circuit and other courts is unduly restrictive of free speech and inconsistent with this Court's precedents. It is well established that orders "prohibiting reporting or commentary on judicial proceedings" are presumptively invalid prior restraints on speech. *Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539, 570 (1976); *id.* at 558. As such, they are subject to a "heavy burden" of justification (*id.*), because "prior restraints are the most serious and the least tolerable infringement on First Amendment rights." *Id.* at 559. *See also* Lawrence Tribe, *American Constitutional Law* 791-92 (2d ed. 1988) ("If a governmental regulation is aimed at the communicative impact of an act, . . . [the] regulation is unconstitutional unless the government shows that the message being suppressed poses a 'clear and present danger' . . . .").

Restrictions on speech concerning criminal trials are particularly suspect because of the particular importance of such events to self-governance: "[I]t would be difficult to

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United States Courts of Appeals" over the proper standard to apply to such gag orders); Michael E. Swartz, Note, *Trial Participant Speech Restrictions: Gagging First Amendment Rights*, 90 Colum. L. Rev. 1411, 1413-14 (1990) ("[c]ourts . . . disagree over the proper legal criterion for th[e] issuance" of "trial-participant gag orders").

single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980). Commentary on criminal trials is "classic political speech" (*Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034 (1991) (Opinion of Kennedy, J.)) that lies at the core of the First Amendment. Moreover, "[t]he role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." *Wood v. Georgia*, 370 U.S. 375, 395 (1962). Thus, for a court to prohibit an indicted official from speaking freely about his prosecution directly and seriously abridges core First Amendment rights. The Fifth Circuit's holding that gag orders on citizens are subject to a lower standard of review than those on the press (App. 19a) is directly contrary to Sixth Circuit precedent (*Ford*, 830 F.2d at 598), and fundamentally inconsistent with this Court's "insistence that the press is not to be given a privileged status." *American Constitutional Law* at 976.[17]

This Court has traditionally applied the most stringent scrutiny to restrictions on extrajudicial statements about pending cases. In *Bridges v. California*, 314 U.S. 252 (1941), this Court reversed the conviction of a labor leader who had been found in contempt of court for publishing a telegram commenting on pending litigation involving his

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[17] *See, e.g., Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991) ("It is . . . beyond dispute that the 'publisher of a newspaper has no special immunity from the application of general laws.'") (quoting *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937)); *Nixon v. Warner Communications*, 435 U.S. 589, 609 (1978) ("The First Amendment generally grants the press no right to information about a trial superior to that of the general public."); *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964); *see also Boehner v. McDermott*, 191 F.3d 463, 477 n.20 (D.C. Cir. 1999) ("the press has no greater First Amendment rights than anyone else").

union. *Id.* at 275-76. In reversing the conviction, the Court emphasized the importance of not restricting the speech of a public figure "during the pendency of a case . . . when public interest in the matters discussed would naturally be at its height." *Id.* at 268. The Court explicitly rejected various potential prejudice standards (*id.* at 273) in favor of the "clear and present" danger standard, "a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." *Id.* at 263. Moreover, the Court emphatically rejected the suggestion that as a spokesman for a litigant, Bridges was entitled to less protection than the publisher of a newspaper:

> It must be recognized that Bridges was a prominent labor leader speaking at a time when public interest in the particular labor controversy was at its height. The observations we have previously made here upon the timeliness and importance of utterances as emphasizing rather than diminishing the value of constitutional protection, and upon the . . . seriousness of the censorial effects of punishing publications in the manner followed below are certainly no less applicable to a leading spokesman for labor than to a powerful newspaper . . . .

*Id.* at 277-78.

Similarly, in *Nebraska Press Association v. Stuart*, the Court unanimously reversed an order prohibiting pretrial reporting on the evidence in a notorious murder case in a small rural community. Although noting the importance of ensuring a fair trial for the accused, the Court wrote "it is nonetheless clear that the barriers to prior restraint remain high." 427 U.S. at 561. Emphasizing that "pretrial publicity – even pervasive, adverse publicity" will not necessarily cause an unfair trial, *id.* at 554, 565, the Court held that restrictions on speech would not be tolerated absent a

showing of imminent harm. *Id.* at 569 (reversal required because proponent of order had failed to "mee[t] the heavy burden of demonstrating . . . that without prior restraint a fair trial *will be denied*") (emphasis added). The Court found insufficient the trial court's finding that "pre-trial publicity *could* impinge upon the defendant's right to a fair trial." *Id.* at 563 (emphasis in original).[18]

The Fifth Circuit, however, concluded that use of the "clear and present danger" standard "appears to have [been] foreclosed" (App. 19a) by *Gentile v. State Bar of Nevada*, *supra*. There the Court upheld a state bar rule prohibiting lawyers from making extrajudicial statements about a case in which they represent a party that "will have a substantial likelihood of materially prejudicing" the case. 501 U.S. at 1060, 1074-76. That decision did nothing, however, to undermine precedents applying heightened scrutiny to restrictions on statements by nonlawyers. *Gentile*'s analysis turned on lawyers' unique ethical duties as officers of the court and as members of a regulated profession.[19]

Not surprisingly, many courts and commentators have concluded that *Gentile* left undisturbed precedents holding that the speech of criminal defendants and witnesses may not

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[18] *Sheppard v. Maxwell*, 384 U.S. 333 (1966), cited repeatedly by the Fifth Circuit (App. 14a-17a, 19a), is not to the contrary. That case neither involved nor endorsed an order restricting a criminal defendant's speech, and suggested that various means *short of* gag orders should be used to prevent prejudice from pretrial publicity. *Id.* at 363.

[19] *See, e.g.*, 501 U.S. at 1066 ("Membership in the bar is a privilege burdened with conditions") (internal quotations omitted); *id.* at 1071 ("lawyers in pending cases [are] subject to ethical restrictions on speech to which an ordinary citizen would not be"); *id.* at 1074 ("[a]s officers of the court, . . . attorneys have a fiduciary responsibility not to engage in public debate that . . . will obstruct the fair administration of justice") (internal quotation omitted); *id.* at 1076 (noting state interest "in preventing prejudice to an adjudicative proceeding by those who have a duty to protect its integrity"); *id.* at 1081-82 (O'Connor, J., concurring).

be restricted absent a clear and present danger to a fair trial. *See, e.g.*, *News-Journal Corp.*, 939 F.2d at 1515 n.18 (stating that "[t]he distinctions between" a gag order directed at trial participants "and *Gentile* are significant" and noting continuing "division in circuit authority regarding the appropriate standard for evaluating restrictive orders imposed on trial participants"); *Hill*, 893 F. Supp. at 1040-41 & n.1; *Davenport*, 834 S.W.2d at 10. Indeed, if anything, "[t]he *Gentile* case would appear to *support*" the conclusion that "an attorney's role as a court officer will subject the attorney to speech regulations different from non-attorney participants such as parties and witnesses." Wetherington et al., *Preparing for the High Profile Case*, 51 Fla. L. Rev. at 466 (emphasis added).

### C. This Case Underscores the Inadequacy of the Fifth Circuit's Standard

This case provides a compelling illustration of the dangers the Fifth Circuit's permissive standard poses to free speech. Although recognizing that this case presented a "somewhat close call" (App. 11a), the court of appeals affirmed a sweeping ban on public statements although there was little in the record to justify it. Because the gag rule permits the government to file (and publicize) detailed allegations but prohibits any public response other than a bare denial of guilt, the publicity so far has been overwhelmingly adverse to Mr. Brown. Thus there was little risk that allowing Mr. Brown to speak would further impair his right to a fair trial instead of simply ensuring the scales are not "tilted . . . in [the government's] favor." *Id.* at 34a. The risk of prejudice was further reduced by the fact that five months remained before trial, *Levine*, 764 F.2d at 598 (publicity "immediately before trial" has "greater potential for prejudice than publicity months in advance of trial") (collecting authorities), which is to be held in a metropolitan area with a large pool of potential jurors. *Compare Nebraska Press Ass'n.*, 427 U.S. at 567 (trial to be held in

area with 850 residents); *CBS, Inc. v. U.S. District Court*, 729 F.2d 1174, 1181 (9th Cir. 1983) (risk of prejudice reduced in populous areas). Nor was there any claim that pretrial publicity might expose potential jurors to evidence that will be inadmissible at trial.

The trial court's conclusory findings of risk of prejudice – made four months *after* the gag order was first entered – rested almost entirely on one episode in which a co-defendant released a handful of wiretap transcripts to the press. *See* App. 44a. That matter has been adequately addressed by the entry of a separate restrictive order, which no party has ever challenged. Because neither the government nor the district court has identified any other "parts of this case" (*id.* at 43a) the discussion of which could be prejudicial, there simply was no credible basis for affirmance of the gag order.

## II. THE FIFTH CIRCUIT'S DECISION THAT TRIAL COURTS NEED NOT EXPLICITLY CONSIDER ALTERNATIVES BEFORE RESTRICTING SPEECH DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND NUMEROUS COURTS OF APPEALS

Before restricting speech about a criminal prosecution, a trial court "must make . . . a judgment as to whether other precautionary steps will suffice" to prevent prejudice. *Nebraska Press Ass'n.*, 427 U.S. at 565. As the Fifth Circuit noted below (App. 26a), the courts of appeals are divided on whether courts must *explicitly* consider less-restrictive alternatives before imposing prior restraints. The Fifth Circuit's conclusion that explicit consideration of alternatives is merely "good judicial practice" (*id.*) and that the requisite review of less-restrictive alternatives may be inferred from a silent record (*id.* at 27a), conflicts with decisions of this Court and the courts of appeals, which make clear that "implied conclusion[s]" (*id.*) about the availability

of less-restrictive alternatives have no place in First Amendment law.

In *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (*Press-Enterprise II*), this Court held that pretrial proceedings in a criminal case could be closed only when "there is a substantial probability that the defendant's right to a fair trial will be prejudiced" otherwise (*id.* at 14) and that closure is "'narrowly tailored to serve that interest.'" *Id.* (quoting *Press-Enterprises Co. v. Superior Court*, 464 U.S. 501, 510 (1984) (*Press-Enterprise I*)). The Court insisted that trial courts take steps to safeguard journalists' "qualified First Amendment right of access" to court proceedings (*id.* at 13), holding that "proceedings cannot be closed unless *specific, on the record findings are made* demonstrating" that closure is necessary. *Id.* at 13-14 (emphasis added). The Court emphasized the necessity of on-the-record findings regarding the adequacy of less-restrictive alternatives, specifically holding that hearings could be closed "*only* if specific findings are made demonstrating that . . . reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights." *Id.* at 14 (emphasis added). Such findings are necessary to ensure that "a reviewing court can determine whether the closure order was properly entered." *Press-Enterprise I*, 464 U.S. at 510.

That holding would follow *a fortiori* here. The press access right at issue in *Press-Enterprise II* was only a "qualified" right. *Press-Enterprise II*, 478 U.S. at 13. By contrast, a defendant's speech concerning his criminal trial is "classic political speech" (*Gentile*, 501 U.S. at 1034 (opinion of Kennedy, J.)) that lies at the core of the First Amendment. *Cf. Bridges*, 314 U.S. at 268, 277-78. That result would also follow from the traditional rule that the proponent of a prior restraint bears the burden of "showing justification" for it (*Nebraska Press Ass'n.*, 427 U.S. at 558 (internal quotation omitted)), and must "sho[w] that . . . no less restrictive alternatives are available." *Id.* at 571 (Powell, J.,

concurring). Where the proponent of the order is the court itself, the court must make that showing through explicit findings.

Unsurprisingly, the vast majority of courts of appeals to have considered the question have concluded that trial courts must make explicit findings about the adequacy of less-restrictive alternatives.[20] As the Fifth Circuit itself noted (App. 26a), in *In re Dow Jones & Co.*, the Second Circuit held that "each [alternative] must be explored and ultimately rejected as inadequate – individually and in combination – as a remedy for prejudicial pretrial publicity before a restraining order is entered." 842 F.2d at 611. In *United States v. Salameh*, 992 F.2d 445, 447 (1993), the Second Circuit made clear that this obligation requires explicit factfinding and will not be satisfied by an "implied conclusion" of the sort inferred by the Fifth Circuit below. In reversing a gag order on counsel, the Second Circuit explicitly relied on the fact that "[t]he [district] court did not make a finding that alternatives to this blanket [speech] prohibition would be inadequate to protect defendants' right to a fair trial before an impartial jury." *Id.* at 447.

The Third Circuit's opinion in *Bailey v. Systems Innovation, Inc.* likewise emphasized that courts must consider the adequacy of "other measures . . . to mitigate the effects of unrestrained pretrial publicity" (852 F.2d at 99) and that "specific factual findings . . . are *essential to any*

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[20] Similarly, several courts of appeals have applied the reasoning of *Press-Enterprise II* to sealing orders, holding that trial courts must make "specific findings" before ordering court documents sealed, including "a discussion of possible alternatives considered and rejected by the court." *In re Washington Post Co.*, 807 F.2d 383, 391 (4th Cir. 1986); *Washington Post v. Robinson*, 935 F.2d 282, 289 (D.C. Cir. 1991) (Wald, J., joined by Ruth Bader Ginsburg and D.H. Ginsburg, JJ.) (following *In re Washington Post*); *In re Search Warrant for Secretarial Area*, 855 F.2d 569 (8th Cir. 1988) (court "must explain why . . . less restrictive alternatives were not appropriate").

*order restricting speech.*" *Id.* (emphasis added). The court noted, in reversing, that "[t]he district court did not make specific factual findings supporting its decision to impose the [gag] rule . . . ." *Id.*

The Sixth Circuit also has rejected the adequacy of "implied conclusion[s]" inferred from a silent record. In *Ford* the court reversed a gag order in part because there was no "specific consideration of less burdensome alternatives of voir dire, sequestration or change of venue." 830 F.2d at 600. Similarly, in *CBS v. U.S. District Court*, the Ninth Circuit reversed a gag order in part because the record did not affirmatively indicate that the district court had considered one particular alternative (emphatic jury instructions).[21] 729 F.2d at 1183. And in contrast to the Fifth Circuit's discussion of alternatives – which in the absence of specific district court findings was necessarily confined to a mere recitation of the general faults of various alternatives (App. 27-28a) – the Ninth Circuit rejected the district court's findings regarding the adequacy of *voir dire* on the grounds that its "conclusory" reasoning "amounts to a general rejection of voir dire as an effective alternative to prior restraint." *Id.* at 1182. The Fifth Circuit's conclusory findings below are troubling for the same reason, wrongly suggesting that crucial alternatives are *per se* inadequate substitutes for prior restraints on speech.

Before the decision below, no court of appeals had (to our knowledge) held that a trial court need not explicitly consider alternatives before imposing a restriction on trial participants' speech. The closest any court has come to this position was in *Russell*, in which the Fourth Circuit rejected

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[21] Various state courts of last resort also have held that trial courts must explicitly discuss and reject less-restrictive alternatives. *See, e.g.*, *State ex rel. The Missoulian*, 933 P.2d at 841; *Breiner*, 835 P.2d at 637; *State ex rel. NBC, Inc. v. Court of Common Pleas*, 556 N.E.2d 1120, 1125 (Ohio 1990).

the claim that a gag order was constitutionally infirm because the trial court did not make "specific, articulated findings" about the need for speech restrictions. 726 F.2d at 1010. In *Russell*, however, the district court had explicitly "reject[ed] as infeasible the suggested alternative of change of venue and . . . using only jury control measures." *Id.* at 1009. Here, by contrast, the district court said not so much as a word to suggest why the proffered alternatives of searching voir dire and emphatic jury instructions were insufficient. App. 46a-48a; Pet. C.A. Br. at 27.

The Fifth Circuit's decision affords inadequate protection to speech. The disciplining effect of an on-the-record review of alternatives to direct prior restraints is necessary "[t]o insure stringent safeguarding of the constitutional rights at stake . . . ." *In re Charlotte Observer*, 882 F.2d 850, 853 (4th Cir. 1989). And, as demonstrated by the Fifth Circuit's wholly conclusory statements regarding the adequacy of possible alternatives (App. 27a-28a), the Fifth Circuit approach provides an inadequate factual basis for appellate courts to fulfill their "obligation to 'make an independent examination of the whole record'" in First Amendment cases to ensure that "'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984) (quoting *New York Times Co. v. Sullivan*, 376 U.S. at 284-86); *see also Press-Enterprise I*, 464 U.S. at 510.

## III. THE FIFTH CIRCUIT'S ERRONEOUS CONCLUSION THAT THE GAG ORDER IS NARROWLY TAILORED CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS

Finally, the gag order approved by the Fifth Circuit is unconstitutionally overbroad. "[W]hen a law burdens core political speech," it can be upheld "only if it is narrowly tailored to serve an overriding state interest." *McIntyre v.*

*Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995). On its face, the gag order here sweeps far more broadly than necessary, broadly encompassing any statement that "*could* interfere with a fair trial or prejudice any defendant, the government, or the administration of justice" (App. 51a), no matter how unlikely it would be to do so. The Fifth Circuit's holding that the gag order is narrowly tailored conflicts with decisions of other courts of appeals.

The stated goal of the gag order here is to prevent prejudice to the jury pool. Even the district court did not say that *all* topics the parties might discuss were potentially prejudicial, just that it was necessary to "prohibi[t] the parties from discussing *certain parts* of this case." *Id.* at 43a (emphasis added). The district court identified only one specific threat of prejudice to the jury: the potential release of wiretapped conversations. *See id.* at 36a; 44a.

By affirming a gag order that was not narrowly tailored to address those "certain parts of this case" (App. 43a) that the district court considered particularly prejudicial, the Fifth Circuit's decision squarely conflicts with the decisions of other courts of appeals.[22] In *Levine*, the Ninth Circuit concluded that an order prohibiting trial participants from making "any statements to members of the news media" was unconstitutionally overbroad because it prohibited types of statements that did not "pose a serious and imminent threat to the administration of justice." 764 F.2d at 599. The *Levine* court directed the district court to fashion an order restricting only specific types of statements that posed an "imminent" threat to the administration of justice. *Id.* *Accord Breiner*, 835 P.2d at 642 (reversing gag order as overbroad in part "because the order does not specify the

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[22] At least one court of appeals has upheld a gag order that was not so tailored. In *Russell*, the Fourth Circuit upheld a comparable gag order, but addressed the overbreadth issue only in conclusory fashion. 726 F.2d at 1008-09, 1011.

classes of comments that would be reasonably likely to prejudice the trial").

The Seventh Circuit also vacated as overbroad a gag order broadly prohibiting defendants from making statements about a case, writing that "an order must be drawn narrowly so as not to prohibit speech which will not have an effect on the fair administration of justice along with speech which will have such an effect." *Chase*, 435 F.2d at 1061. Similarly, the Second Circuit vacated as "not narrowly tailored" a broad prohibition of public statements that "have anything to do with this case," emphasizing that restrictions on speech "should be no broader than necessary to protect the integrity of the judicial system and the defendant's right to a fair trial." *Salameh*, 992 F.2d at 447 (citations omitted).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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August 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 00-30134

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAMES HARVEY BROWN, also known as Jim Brown,

Defendant-Appellant.

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Appeal from the United States District Court for the Middle District of Louisiana, Baton Rouge

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July 6, 2000

Before KING, Chief Judge, and GARWOOD and DeMOSS, Circuit Judges.

GARWOOD, Circuit Judge:

Defendant-appellant James Harvey "Jim" Brown (Brown), a prominent Louisiana political figure, is currently under indictment in the Middle District of Louisiana on various charges relating to the brokering of an alleged "sham" settlement of a threatened lawsuit by the State of Louisiana against the president of a failed automobile insurance company. The district court *sua sponte* entered a gag order that prohibits attorneys, parties, or witnesses from discussing with "any public communications media" anything about the case "which could interfere with a fair trial," including statements "intended to influence public opinion regarding the merits of this case," with exceptions for matters of public record and matters such as assertions of

innocence. The district court denied Brown's motion to vacate or modify the gag order, and Brown now appeals that denial. We affirm.

**Facts and Proceedings Below**

Brown is the elected Insurance Commissioner for the State of Louisiana. On September 24, 1999, Brown, along with five others, including former Louisiana Governor Edwin W. Edwards (Edwards), was indicted in United States District Court for the Middle District of Louisiana on numerous counts of conspiracy, mail and wire fraud, insurance fraud, making false statements, and witness tampering. The charges all relate to Brown's alleged use of his influence as Insurance Commissioner to help construct, along with Edwards and the other defendants, a "sham settlement" that derailed a $27 million lawsuit threatened by the state against David Disiere, president of Cascade Insurance Co., a failed automobile insurance carrier. In a news conference shortly after the indictment was issued, Brown declared his innocence as well as his belief that he was the victim of a "political drive-by shooting" at the hands of "an out-of-control prosecutor." After some delays, the trial is currently scheduled to commence on August 21, 2000.

On the day the indictment was issued against Brown and his co-defendants, the district court entered on its own motion a gag order prohibiting parties, lawyers, and potential witnesses from giving to "any public communications media" "any extrajudicial statement or interview" about the trial (other than matters of public record) that "could interfere with a fair trial or prejudice any defendant, the government, or the administration of justice." The order provides that "[s]tatements or information intended to influence public opinion regarding the merits of this case are specifically designated as information which could prejudice a party." The order expressly does not prevent the parties from discussing, "without elaboration or any kind of

characterization," (1) the general nature of any allegations or defenses; (2) information contained in the public record; (3) scheduling information; (4) any decision or order by the court that is a matter of public record; and (5) "the contents or substance" of any motion filed in the case, to the extent the motion is a matter of public record.

The district court had previously entered a similar gag order for a related case pending in the same court in which Edwards was also a defendant. In that case, Edwards and six others were charged with multiple counts of racketeering, extortion, money laundering, and wire and mail fraud for allegedly extorting money from parties who sought licenses to operate riverboat casinos in Louisiana. On May 9, 2000, the jury convicted Edwards and four other defendants; the district court has subsequently lifted the gag order in that case. A third case is also pending before the same district court, this one concerning allegations that three individuals (not parties to the present appeal) improperly used their political influence to steer the awarding of certain lucrative contracts. As the district court noted, these three cases concern different alleged acts of wrongdoing but involve many of the same defendants and arose from the same federal investigation. Given the allegations of corruption against several prominent political and business figures, all three cases have generated extensive and intense local and national media attention.

On September 28, 1999, the district court temporarily lifted the gag order in this case to avoid interfering with Brown's re-election campaign for Insurance Commissioner. Shortly thereafter, various defendants[1] released to the media recordings (as well as transcripts of recordings) of telephone conversations relevant to the case, and also conducted

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[1]In its denial of Brown's motion to vacate or modify the order, the district court noted that this had happened but did not specify which defendants engaged in these acts.

interviews while playing the recordings. The release of these recordings attracted further interest from the press. On October 7, 1999, the district court entered a limited order prohibiting the parties from releasing recordings (or transcripts of recordings) made prior to the trial. The limited order also prohibited the release of any other discoverable material. At a status conference on October 14, 1999, the district court explained that it had entered the limited order "to stop an avalanche of both government and defendants picking out tapes and start playing all these tapes on radio and television." The court also invited the parties to suggest modifications to the order if they believed any modifications were necessary. None did so.

On November 18, 1999, the district court reimposed the original gag order, to be effective in its entirety when the polls closed on November 20, voting day for the Insurance Commissioner run-off election.[2] At a status conference conducted on November 18, Brown objected to the gag order. The district court responded that it believed the order to be necessary in light of the considerable publicity surrounding the trial,[3] but emphasized his willingness to consider any modification that the parties might suggest.[4] On November 30, 1999, Brown moved to vacate or modify the order. After conducting a hearing on the motion on January 4, 2000, the district court requested that the parties submit proposed modifications to the gag order. Brown proposed that the substance of the order remain intact, but that it should only apply to counsel, not to defendants or witnesses. On February 4, 2000, the district court denied Brown's motion to

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[2]Brown was ultimately re-elected Insurance Commissioner.

[3]Regarding the intense media interest in the case, including legions of reporters waiting outside the courtroom while the November 18 hearing took place, the district court emphasized that "I am not going to let this get out of hand."

[4]"I modified it once; I can modify it again."

vacate or modify the gag order. Brown then petitioned this Court for a writ of mandamus to vacate the gag order; his petition was denied. *See In re Brown*, No. 00-30144 (5th Cir. Feb. 21, 2000) (unpublished). On February 7, 2000, Brown filed a notice of appeal from the district court's denial of his motion to vacate or modify the gag order. It is that appeal which we address here.

**Discussion**

I. Jurisdiction

As a threshold matter, we must determine whether we have jurisdiction to hear Brown's appeal at all. Both Brown and the only other party to this appeal, appellee the United States, which defends the district court's order, agree that the order is appealable. However, "appellate jurisdiction is not a matter of consent." *Trient Partners I Ltd. v. Blockbuster Entertainment Corp.*, 83 F.3d 704, 708 (5th Cir. 1996). This question is particularly important in light of a recent decision by another panel of this Court, which casts some doubt on our ability to hear the appeal. In the riverboat casino license case, which had been pending before the same district court, Edwards and the other defendants appealed the district court's denial of their motion to lift an identical gag order. This Court dismissed their appeal for lack of jurisdiction. *See United States v. Edwards*, 206 F.3d 461 (5th Cir. 2000) (*per curiam*). The special circumstances in *Edwards*, however, distinguish it, and we conclude that we have jurisdiction to consider the merits of Brown's appeal.

In what is commonly referred to as the final judgment rule, Congress has limited the jurisdiction of this Court to "final decisions of the district courts." 28 U.S.C. § 1291. One of the exceptions to the final judgment rule is known as the collateral order doctrine, which the Supreme Court announced in *Cohen v. Beneficial Industrial Loan Corp.*, 69 S.Ct. 1221 (1949). "The collateral order doctrine establishes that certain decisions of the district court are final in effect

although they do not dispose of the litigation." *Davis v. East Baton Rouge Parish Sch. Bd.*, 78 F.3d 920, 925 (5th Cir. 1996). Under this doctrine, some orders may be appealed despite the absence of final judgment if they (1) are conclusive, (2) resolve important questions that are separate from the merits, and (3) are effectively unreviewable on appeal from the final judgment in the underlying action. *See In re Grand Jury Subpoena*, 190 F.3d 375, 381 (5th Cir. 1999) (quoting *Cunningham v. Hamilton County*, 119 S.Ct. 1915, 1919 (1999)).

We conclude that the district court's denial of Brown's motion to vacate or modify the gag order is appealable under the collateral order doctrine. First, in terms of Brown's request that the gag order be vacated entirely or at least not applied to him, the order is conclusive. Second, the question at issue – weighing the competing interests of a trial participant's First Amendment right to discuss his criminal trial freely against the district court's obligation to ensure a fair trial and dispense justice in an orderly manner – is unquestionably important. Moreover, it is entirely divorced from the merits of Brown's criminal trial. Third, the district court's refusal to vacate or modify the gag order as Brown requested would be completely unreviewable not only in the event of Brown's acquittal, but also doubtless in the event of conviction because Brown would almost certainly be unable to demonstrate that his conviction had somehow been tainted by his inability to make "extrajudicial comments," to the public media, which, by definition, have no bearing on the trial itself. Brown asserts First Amendment, not fair trial, rights.

We do not believe that the holding of the *Edwards* panel requires us to reach a different conclusion. The *Edwards* panel omitted any explanation why the gag order in that case was not appealable under the collateral order doctrine, *i.e.*, it did not state which, if any, of the doctrine's three factors the order failed to satisfy. The *Edwards* panel did, however,

specifically mention a feature of the *Edwards* appeal distinguishing it from Brown's, namely that the *Edwards* defendants waited ten months before either objecting to the gag order or attempting to have it modified. The district court dismissed their motion to vacate or modify as "frivolous." *Edwards*, 206 F.3d at 462. In this case, by contrast, Brown objected immediately to the gag order and has pursued his objection vigorously. Unlike the *Edwards* defendants, he has not been dilatory. Nor do we discern anything frivolous about Brown's appeal. Another aspect of Brown's appeal distinguishes it from *Edwards*. Brown's argument on appeal, as below, is that the order violates his First Amendment rights; he does not argue that it damages his right to a fair trial. However, the *Edwards* opinion reflects that the argument of the putative appellants there was that the gag order "[wa]s damaging the [D]efendants ability to obtain a fair trial." *Id.* at 462. Whether the gag order did materially damage the *Edwards* defendants' fair trial rights would have to be determined on appeal from any conviction and *if* such contention were sustained,[5] would be wholly vindicated by ordering a new trial, while an acquittal would necessarily negate any injury to the fair trial interest. As above noted, however, that is simply not the case with respect to Brown's First Amendment claim. We conclude that *Edwards* is not controlling in the present setting.

The *Edwards* panel's wariness of applying the collateral order doctrine was also apparently influenced by the Supreme Court's command that federal courts apply the collateral doctrine "with the utmost strictness" in criminal cases. *See Flanagan v. United States*, 104 S.Ct. 1051, 1054 (1984). Animating this reticence to apply the collateral order exception in criminal cases is section 1291's policy of

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[5]And basing the motion to vacate the gag order on such an argument may have been, in addition to motion's belatedness, what prompted the *Edwards* trial court to characterize the motion to vacate as "frivolous."

finality, which is most compelling in the criminal context. *See id.*; *see also United States v. Hollywood Motor Car Co.*, 102 S.Ct. 3081 (1982) (*per curiam*) ("This Court has long held that [the doctrine of finality] is inimical to piecemeal appellate review of trial court decisions which do not terminate the litigation, and that this policy is at its strongest in the field of criminal law . . . ."); *DiBella v. United States*, 82 S.Ct. 654, 656-57 (1962) ("Th[e] insistence on finality and prohibition of piecemeal review discourage undue litigiousness and leaden-footed administration of justice, particularly damaging to the conduct of criminal cases."). Each type of pretrial order that the Supreme Court has recognized as appropriate for interlocutory appeal via the collateral order doctrine – orders denying a motion to reduce bail, or denying a motion to dismiss an indictment on Double Jeopardy, Speech, or Debate Clause grounds – not only satisfied the requirements of *Cohen*, but also involved "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *Flanagan*, 104 S.Ct. at 1055 (citation omitted). Brown's asserted right to contemporaneously comment on his case in public and defend his reputation would, like the other rights recognized by the Supreme Court, "be irretrievably lost if review were postponed until trial is completed." *Id.* Moreover, Brown's interest in contemporaneously making his case before the public would arguably not be "largely satisfied by an acquittal resulting from the prosecution's failure to carry its burden of proof," *id.* at 1056, and the damage to his personal and professional reputations may already be done by the conclusion of trial.

Importantly, hearing Brown's appeal under the collateral order doctrine does nothing to threaten or undermine the finality of, or the conduct of proceedings in, his criminal case because the trial will proceed regardless of this Court's consideration of his present appeal and the result of this appeal, favorable to Brown or not, will not be dispositive of

the merits of or procedures followed in his criminal case. Because such finality concerns were the Supreme Court's principal reason for eschewing the collateral order doctrine in all but a few types of orders in criminal cases, we see no reason *not* to entertain this appeal pursuant to the doctrine.

Our conclusion finds support in the fact that this Court and other Courts of Appeals have repeatedly held, in both civil and criminal trials, that gag orders imposed on members of the press are appealable under the collateral order doctrine. *See Davis*, 78 F.3d at 925-26 (holding that district court's denial of news agencies' motion to vacate confidentiality order in desegregation litigation appealable under collateral order doctrine); *United States v. Chagra*, 701 F.2d 354, 358 (5th Cir. 1983) (finding that district court's closure of pretrial bail reduction hearing was appealable under the doctrine); *United States v. Gurney*, 558 F.2d 1202, 1207 (5th Cir. 1977) (concluding that denial of press access to certain court documents in high-profile criminal suit was an appealable collateral order); *see also In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1330 (D.C. Cir. 1985); *United States v. Schiavo*, 504 F.2d 1, 4 (3d Cir. 1974). This Court's decisions allowing appeals by the press of gag orders did not depend on any special status of the press as third-parties to the criminal trial. *See Davis*, 78 F.3d at 925-26; *Chagra*, 701 F.2d at 358; *Gurney*, 558 F.2d at 1202. Accordingly, we perceive no reason to limit the appealability of this type of order to members of the media alone.

In that same vein, we note that other Courts of Appeals have also found gag orders appealable under the collateral order doctrine by trial participants, including the litigants themselves. *See, e.g., In re Rafferty*, 864 F.2d 151, 155 (D.C. Cir. 1988) (finding in a civil case that "[i]t would certainly be anomalous if a litigant in Mr. Rafferty's shoes who wished to distribute information to the government or to the media could not appeal an order forbidding him from doing so, while the newspaper to whom he wished to give his story

were able to appeal"); *United States v. Ford*, 830 F.2d 596, 598 (6th Cir. 1987) (finding jurisdiction under collateral order doctrine to consider appeal by criminal defendant politician contesting validity of gag order). Regarding this jurisdictional question, *Ford* is on point with both *Edwards* and the present appeal. While the *Edwards* panel chose not to follow *Ford* "in the circumstances of this case," *see Edwards*, 206 F.3d at 462 n.1, we see no reason not to do so in the present somewhat difference circumstances.[6] We hold, therefore, that pursuant to the collateral order doctrine, we have jurisdiction over Brown's appeal from the district court's order.[7]

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[6]As discussed in Part II, *infra*, we do not find *Ford* controlling in our disposition of Brown's constitutional claim under the facts here.

[7]We reject Brown's alternative argument that this Court has jurisdiction under 28 U.S.C. § 1292(a)(1). Section 1292(a)(1) authorizes appeals from interlocutory orders that grant or deny an injunction, or have "the practical effect of doing so." *United States v. Garner*, 749 F.2d 281, 286 (5th Cir. 1985) (quoting *Carson v. American Brands, Inc.*, 101 S.Ct. 993, 996-97 (1981)). Whether or not the gag order has the practical effect of granting an injunction against making extrajudicial comments, "[a]n order by a federal court that relates only to the conduct or progress of litigation before that court ordinarily is not considered an injunction and therefore is not appealable under § 1292(a)(1)." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 108 S.Ct. 1133, 1138 (1988); *see also Switzerland Cheese Ass'n, Inc. v. E. Horne's Market, Inc.*, 87 S.Ct. 193, 195 (1966) ("Orders that in no way touch on the merits of the claim but only relate to pretrial procedures are not in our view 'interlocutory' within the meaning of [§] 1292(a)(1)."); *Rauscher Pierce Refsnes, Inc. v. Birenbaum*, 860 F.2d 169, 172 (5th Cir. 1988); *Shanks v. City of Dallas*, 752 F.2d 1092, 1095 (5th Cir. 1985). Accordingly, section 1292(a)(1) "does not authorize appeals from orders that compel or restrain conduct pursuant to the court's authority to control proceedings before it, even if the order is cast in injunctive terms." *Hamilton v. Robertson*, 854 F.2d 740, 741 (5th Cir. 1988) (*per curiam*) (quoting *Hunt v. Bankers Trust Co.*, 799 F.2d 1060, 1066 (5th Cir. 1986)). As a case management order, the gag order at issue here was indisputably crafted to control the proceedings, in no way impacts the merits of the case against Brown, and therefore is not appealable under section 1292(a)(1).

II. Brown's Constitutional Claim

Brown contends that the district court's gag order violates his rights under the First Amendment. We do not agree. While this case presents a somewhat close call, we conclude that the gag order is constitutionally permissible because it is based on a reasonably found substantial likelihood that comments from the lawyers and parties might well taint the jury pool, either in the present case or one of the two related cases, is the least restrictive corrective measure available to ensure a fair trial, and is sufficiently narrowly drawn. The district court applied the correct legal principles in entering such an order and its factual conclusions are adequately supported by the record.

Intense publicity surrounding a criminal proceeding – what Justice Frankfurter referred to as "trial by newspaper" – poses significant and well-known dangers to a fair trial. *See Pennekamp v. Florida*, 66 S.Ct. 1029, 1043, 1047 (1946) (Frankfurter, J., concurring) ("[I]t is indispensable . . . that in a particular controversy pending before a court and awaiting judgment, human beings, however strong, should not be torn from their moorings of impartiality by the undertow of extraneous influence."); *see also Bridges v. California*, 62 S.Ct. 190, 197 (1941) ("Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper."); *Patterson v. Colorado*, 27 S.Ct. 556, 558 (1907) (Holmes, J.) ("The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."). Paramount among these dangers is the potential that pretrial publicity may taint the jury venire, resulting in a jury that is biased toward one party or another.[8] "Few, if any, interests

[8]Other principal dangers include disseminating to the press inadmissible evidence, the exclusion of which at trial "is rendered meaningless when news media make it available to the public," as well as

under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors, and an outcome affected by extrajudicial statements would violate that fundamental right." *Gentile v. State Bar of Nevada*, 111 S.Ct. 2720, 2745 (1991).

Accordingly, trial courts have "an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity." *Gannett Co. v. DePasquale*, 99 S.Ct. 2898, 2904 (1979); *see also Chandler v. Florida*, 101 S.Ct. 802, 809 (1981) ("Trial courts must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law."); *United States v. Noriega*, 917 F.2d 1543, 1549 (11th Cir.) (*per curiam*), *cert. denied sub nom. Cable News Network v. Noriega*, 111 S.Ct. 451 (1990). The beneficiaries of this duty include not only the defendant in a given trial, but other defendants as well, such as co-defendants in the same case or defendants in related cases (as there are here), whose fair trial rights might be prejudiced by the extrajudicial statements of other trial participants. The vigilance of trial courts against the prejudicial effects of pretrial publicity also protects the interest of the public and the state in the fair administration of criminal justice.[9]

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creating a "carnival atmosphere," which threatens the integrity of the proceeding. *See Sheppard v. Maxwell*, 86 S.Ct. 1507, 1520-21 (1966).

[9]It makes no difference that Brown is contesting the gag order as violative of his First Amendment rights instead of embracing it as protective of his Sixth Amendment right to a fair trial. As one commentator has aptly noted, "under the Sixth Amendment, a criminal defendant is entitled to a fair and impartial jury, not a jury whose views have been deliberately manipulated by outside influences to be biased in his or her favor." Eileen A. Minnefor, *Looking for Fair Trials in the Information Age: The Need for More Stringent Gag Orders Against Trial Participants*, 20 U.S.F. L. REV. 95, 115-16 (1995) (citing *Pennekamp*, 66 S.Ct. at 1044 (Frankfurter, J., concurring)); *see also In re Morrissey*, 168

This duty comports with the constitutional status of all First Amendment freedoms, which are not absolute but must instead be "applied in light of the special characteristics of the [relevant] environment." *Tinker v. Des Moines Indep. Community Sch. Dist.*, 89 S.Ct. 733, 736 (1969). Indeed, "[a]lthough litigants do not 'surrender their First Amendment rights at the courthouse door,' those rights may be subordinated to other interests that arise" in the context of both civil and criminal trials. *Seattle Times Co. v. Rhinehart*, 104 S.Ct. 2199, 2207-08 n.18 (1984). "[O]n several occasions this Court has approved restriction on the communications of trial participants where necessary to ensure a fair trial for a criminal defendant." *Id.* There can be no question that a criminal defendant's right to a fair trial may not be compromised by commentary, from any lawyer or party, offered up for media consumption on the courthouse steps. *See Estes v. Texas*, 85 S.Ct. 1628, 1632 (1965) ("We have always held that the atmosphere essential to the preservation of a fair trial – the most fundamental of all freedoms – must be maintained at all costs."); *Pennekamp*, 66

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F.3d 134, 138 (4th Cir. 1999) (noting that local rules of professional conduct limiting lawyers' extrajudicial comments further "the important governmental interest of protecting both the accused's and the public's right to a fair trial"); *Levine v. United States Dist. Court*, 764 F.2d 590, 596-97 (9th Cir. 1985) ("It does not follow . . . that the need to restrict publicity is lessened when the publicity is caused by the actions of the defense, rather than the prosecution."); *United States v. Tijerina*, 412 F.2d 661, 666 (10th Cir. 1969); *cf. Estes v. Texas*, 85 S.Ct. 1628, 1636 (1965) ("A defendant on trial for a specific crime is entitled to his day in court, not in a stadium, or a city or nationwide arena."); *Singer v. United States*, 85 S.Ct. 783, 790 (1965) ("The Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before a tribunal which the Constitution regards as most likely to produce a fair result."). Accordingly, it seems to us that the *Ford* Court was incorrect when it stated, "[t]o the extent that publicity is a disadvantage for the government, the government must tolerate it." *Ford*, 830 F.2d at 600.

S.Ct. at 1047 (Frankfurter, J., concurring) ("In securing freedom of speech, the Constitution hardly meant to create the right to influence judges or juries.").

Despite the fact that litigants' First Amendment freedoms may by limited in order to ensure a fair trial, gag orders such as this one still exhibit the characteristics of prior restraints. *See In re Dow Jones*, 842 F.2d 603, 609 (2d Cir. 1988); *Levine v. United States District Court*, 764 F.2d 590, 595 (9th Cir. 1985). Prior restraints – "predetermined judicial prohibition restraining specified expression" – face a well-established presumption against their constitutionality. *See Bernard v. Gulf Oil Co.*, 619 F.2d 459, 467 (5th Cir. 1980) (*en banc*) (citations omitted). In general, a prior restraint (usually directed at the press) will be upheld only if the government can establish that "the activity restrained poses either a clear and present danger or a serious and imminent threat to a protected competing interest." *See Levine*, 764 F.2d at 595 (citations omitted). The government must also establish that the order has been narrowly drawn and is the least restrictive means available. *See id.* (citations omitted).

A. Appropriate Legal Standard

The first element of the prior restraint analysis – the showing of harm necessary to justify the need for the restraint – requires some discussion in the present context because the gag order at issue here is directed at trial participants and not the press. The Supreme Court and other Courts of Appeals have recognized a "distinction between participants in the litigation and strangers to it," pursuant to which gag orders on trial participants are evaluated under a less stringent standard than gag orders on the press. *See Gentile*, 111 S.Ct. at 2743-44; *News-Journal Corp. v. Foxman*, 939 F.2d 1499, 1512-13 & n.16 (11th Cir. 1991); *Dow Jones*, 842 F.2d at 608-09; *Levine*, 764 F.2d at 595. The genesis of this distinction lies in part in *Sheppard v. Maxwell*, 86 S.Ct. 1507 (1966), which concerned the massive publicity surrounding

the trial of Dr. Sam Sheppard. The Supreme Court observed that during Sheppard's trial, "bedlam," in the form of reporters virtually taking over the courtroom and accosting witnesses as they left the building, "reigned at the courthouse." *See id.* at 1518. The Court also noted that inadmissible (and often inaccurate) information had been leaked to the public, fueling the firestorm of publicity already raging around the case. *See id.* at 1521. Acknowledging the importance of a free and responsible press as "the handmaiden of effective judicial administration, especially in the criminal field," *id.* at 1515, the Court considered various, less restrictive alternatives to gagging the press itself; among them, the Court stated that "the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters," *id.* at 1521.[10] In that case, a gag order imposed on the trial participants "might well have prevented the divulgence of inaccurate information, rumors, and accusations that made up much of the inflammatory publicity, at least after Sheppard's indictment," *id.* at 1521, "without [a] corresponding curtailment of the news media," *id.* at 1522.[11] The Court noted that due process "requires that the accused receive a trial by an impartial jury free from outside influences" and that "[n]either prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers . . . should be permitted to frustrate its function." *Id.*

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[10]The other corrective measures discussed in *Sheppard* included change of venue, trial postponement, a "searching" voir dire, jury instructions, and juror sequestration. *See Nebraska Press Ass'n v. Stuart*, 96 S.Ct. 2791, 2804-05 (1976); *Sheppard*, 86 S.Ct. at 1519-22.

[11]The *Sheppard* Court further noted that "[h]ad the judge, the other officers of the court, and the police placed the interest of justice first, the news media would have soon learned to be content with the task of reporting the case as it unfolded in the courtroom – not pieced together from extrajudicial statements." *Id.* at 1522.

Ten years later, in *Nebraska Press Association v. Stuart*, 96 S.Ct. 2791 (1976), the Supreme Court vacated on prior restraint grounds an order prohibiting the press from publishing accounts about certain evidence that would be used in a widely reported murder trial taking place in a small, rural community. *See* 96 S.Ct. at 2807. In doing so, the Court endorsed *Sheppard*'s proposal that trial courts employ methods short of prior restraints on the press, including the prohibition of extrajudicial comments by trial participants, in order to mitigate the potentially prejudicial effects of pretrial publicity. *See id.* at 2800-01; *see also Foxman*, 939 F.2d at 1514 (11th Cir. 1991).[12]

*Gentile v. State Bar of Nevada*, 111 S.Ct. 2720 (1991), represents the Supreme Court's most recent discussion of limitations imposed on the speech of trial participants. In *Gentile*, the Court considered an attack on a Nevada Supreme Court rule prohibiting any attorney from making extrajudicial comments to the media that the attorney knew or should have known would "have a substantial likelihood of materially prejudicing an adjudicative proceeding." *Gentile*, 111 S.Ct. at 2723.[13] Observing that in earlier opinions the Court had

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[12]In a situation more analogous to the present case, then-Associate Justice Rehnquist, writing as Circuit Justice, denied the request by a media organization and group of reporters to stay a judicially imposed gag order restraining trial participants from speaking directly with the press about a high-profile murder trial. *See KPNX Broad. Co. v. Arizona Superior Court*, 103 S.Ct. 584 (Rehnquist, Circuit Justice 1982). Citing *Sheppard*'s admonition that trial courts take measures to avoid the prejudicial effects of publicity in sensational cases, Justice Rehnquist concluded that "I do not have the slightest doubt that a trial judge may insist that the only performance which goes on in the courtroom is the trial of the case at hand." *Id.* at 586. He further observed that "[t]he mere potential for confusion if unregulated communication between trial participants and the press at a heavily covered trial were permitted is enough to warrant a measure such as the trial judge took in this case." *Id.* at 586-87.

[13]In *Gentile*, an attorney representing a criminal defendant called a press conference and, in violation of the Nevada rule, lambasted the

"expressly contemplated that the speech of those participating before the courts could be limited," a majority of the *Gentile* Court stated that prior precedent, including *Sheppard*, "rather plainly indicate[d] that the speech of lawyers representing clients in pending cases may be regulated under a *less demanding standard* than that established for regulation of the press in *Nebraska Press*." *Id.* at 2744 (opinion of Rehnquist, C.J.) (citations omitted) (emphasis added). Accordingly, the Court found that demonstrating a "substantial likelihood of material prejudice" from an attorney's extrajudicial comments, which the Nevada rule required, as opposed to a "clear and present danger," was constitutionally sufficient to justify prescribing attorney comments of that type. *See id.* at 2745; *cf. In re Express-News Corp.*, 695 F.2d 807, 810 (5th Cir. 1982) (applying strict scrutiny to court order denying *press* right to interview jurors).

In *Gentile*, the Supreme Court merely approved Nevada's "substantial likelihood" standard when applied to gag orders imposed on attorneys, but did not mandate it as a constitutional minimum necessary to justify a judicially-imposed restriction on attorney speech. Moreover, neither the Supreme Court nor this Court has articulated a standard to apply when evaluating gag orders directed at attorney or non-attorney trial participants.[14] Our sister circuits have not

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investigating officers and other victims as corrupt. 111 S.Ct. at 2739. Much like Brown, the attorney admitted that his motivation for doing so was "to counter public opinion which he perceived as adverse to his client, to fight back against the perceived efforts of the prosecution to poison the prospective juror pool, and to publicly present his client's side of the case." *Id.*

[14] *Davis v. East Baton Rouge Parish School Board*, 78 F.3d 920 (5th Cir. 1996), which concerned an appeal by the press of a court-imposed confidentiality order on parties and attorneys in a school desegregation case, is of limited relevance to this appeal. As the district court noted, *Davis* was a non-jury civil case in which the Court found "no possibility

reached a consensus on this question. The Fourth and Tenth Circuits have held that a trial court may restrict extrajudicial comments by trial participants, including lawyers, parties, and witnesses, based on a determination that those comments present a "reasonable likelihood" of prejudicing a fair trial. *See In re Russell*, 726 F.2d 1007, 1010 (4th Cir. 1984); *United States v. Tijerina*, 412 F.2d 661, 666-67 (10th Cir. 1969).[15] The Sixth, Seventh, and Ninth Circuits have applied more stringent tests, requiring either a showing of "clear and present danger" or "serious and imminent threat" of prejudicing a fair trial. *See Ford*, 830 F.2d at 600-02 ("clear and present danger"); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th Cir. 1975), *cert. denied sub nom. Cunningham v. Chicago Council of Lawyers*, 96 S.Ct. 3201

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that publicity will prejudice potential jurors." *Id.* at 929. Moreover, *Davis* did not announce any standard by which to judge this order; the Court declined to decide whether to apply strict scrutiny "or some variant of the reasonable likelihood standard" because the order could not survive under either. *See id.* This case, by contrast, is a criminal matter in which the primary concern of the district court was the possibility that pretrial publicity would taint the jury pools for Brown's trial and the two related trials.

[15]In an appeal *by members of the media* challenging a gag order that restrained participants in a criminal trial from speaking with the press, the Second Circuit has also held that a "reasonable likelihood" that pretrial publicity will prejudice a fair trial is sufficient to justify an order of that type. *See Dow Jones*, 842 F.2d at 609. Here, Brown is the sole challenger of the gag order.

Two recent opinions have addressed fact patterns similar to *Gentile* and, in light of that case, have followed local rules of professional conduct that prohibit attorneys from making extrajudicial comments that are "reasonably likely" to prejudice the proceedings. *See Morrissey*, 168 F.3d at 140 (concluding that the "reasonable likelihood" standard was constitutionally permissible under *Gentile*); *United States v. Cutler*, 58 F.3d 825, (2d Cir. 1995) (affirming contempt conviction for criminal defense attorney who violated court order demanding compliance with local rule that used "reasonable likelihood" standard).

(1976) ("serious and imminent threat"); *Levine*, 764 F.2d at 596 ("clear and present danger").

We decline to adopt the more stringent tests advocated by the Sixth, Seventh, and Ninth Circuits because *Gentile* appears to have foreclosed the applicability of those tests to the regulation of speech by trial participants. The cases endorsing some version of the "clear and present danger" test all predated *Gentile* and did not consider the distinction – explicitly recognized in that case – between trial participants and the press for purposes of a trial court's ability to restrict the speech of those two groups. *See, e.g., Ford*, 830 F.2d at 598. Under *Gentile*, *Sheppard*, and *Nebraska Press*, it seems plain that the "clear and present danger" test, and the variants thereof, are appropriate for protecting the unique role of the press as the public's "eyes and ears" into the criminal justice system. *Cf. Houchins v. KQED, Inc.*, 98 S.Ct. 2588, 2593 (1978) (characterizing the press as the "eyes and ears" of the public).

Having rejected the "clear and present danger" test, we must next identify an appropriate, less stringent standard. As noted above, the Fourth and Tenth Circuits have concluded that gag orders imposed on any trial participant may be justified by a "reasonable likelihood" that extrajudicial commentary will prejudice a fair trial. *See Russell*, 726 F.2d at 1010; *Tijerina*, 412 F.2d at 666-67. The Supreme Court in *Gentile* found that a "substantial likelihood" of prejudice was sufficient to justify a restriction on extrajudicial comments by attorneys. The difference between these two standards is not clear – we would assume that "substantial likelihood" connotes a stronger showing than "reasonable likelihood" – but we do not decide between them here. Instead, we conclude that a district court may in any event impose an appropriate gag order on parties and/or their lawyers if it determines that extrajudicial commentary by those individuals would present a "substantial likelihood" of prejudicing the court's ability to conduct a fair trial. We do

not address whether a trial court may also impose a similar gag order based on a "reasonable likelihood" of prejudice.

The fact that the gag order in this case concerns the speech of parties as well as attorneys requires some consideration. The *Gentile* Court premised its approval of the Nevada rule's "substantial likelihood" standard in part on the unique role of attorneys as "officers of the court" who "in pending cases [are] subject to ethical restrictions on speech to which an ordinary citizen would not be." *See Gentile*, 111 S.Ct. at 2743. The context of this case is different, however: it concerns a judicially crafted restriction on the extrajudicial speech of all trial participants, not a general rule of professional conduct. An attorney's ethical obligations to refrain from making prejudicial comments about a pending trial will exist whether a gag order is in place or not. In this case, the driving interest of the district court was to preserve the fair trial interests of the parties in all three related cases. As the district court pointed out, trial participants, like attorneys, "are privy to a wealth of information that, if disclosed to the public, could readily jeopardize the fair trial rights of all parties." The mischief that might have been visited upon the three related trials – primarily, jury tainting – would have been the same whether prejudicial comments had been uttered by the parties or their lawyers. In other words, the problem the district court sought to avoid depended in no way on the identity of the speaker as either a lawyer or a party: the interests of the lawyers and the parties in "trying the case in the media" were (and continue to be) the same. In light of these considerations, there appears to be no reason, at least where lawyers and parties have each demonstrated a "substantial likelihood" of making prejudicial comments outside the courtroom, to distinguish between the two groups

for the purpose of evaluating a gag order directed at them both.[16]

In sum, we conclude that in light of *Gentile*, "clear and present danger" cannot be the appropriate standard by which we evaluate gag orders imposed on trial participants. Instead, the standard must require a lesser showing of potential prejudice. If the district court determines that there is a "substantial likelihood" (or perhaps even merely a "reasonable likelihood," a matter we do not reach) that extrajudicial commentary by trial participants will undermine a fair trial, then it may impose a gag order on the participants, as long as the order is also narrowly tailored and the least restrictive means available. This standard applies to both lawyers and parties, at least where the court's overriding interest is in preserving a fair trial and the potential prejudice caused by extrajudicial commentary does not significantly depend on the status of the speaker as a lawyer or party. Accordingly, we now address the propriety of the gag order imposed in this case.

B. Merits of the Gag Order

1. Substantial Likelihood of Prejudice

We conclude that the district court did identify a "substantial likelihood" that the extrajudicial comments of the trial participants would prejudice its ability to conduct fair trials in all three related cases. While the district court did not decide whether it must demonstrate a "clear and present danger" or "reasonable likelihood" of prejudice, and instead determined that it could meet either standard, we find that it met its burden in this case.

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[16]There may conceivably be occasions in which we evaluate restrictions placed on speech by attorneys under a different standard than speech by parties, but we do not address that question here.

In denying Brown's motion to modify the gag order, the district court articulated two major concerns about the possible impact of extrajudicial statements on the three trials, and made specific findings about the conduct of the parties persuading it that these fears might well be realized. As indicated above, by the time the district court entered the order, the trio of related cases had attracted intense and extensive media attention. The district court's first concern was that "[u]nrestricted statements by the participants in this trial would only serve to increase the volume of pre-trial publicity." This was of course quite legitimate: *Sheppard* made clear that trial judges have a responsibility to avoid the creation of a "carnival atmosphere" in high-profile cases. *See Sheppard*, 86 S.Ct. at 1520-21. The district court's next, and "primary," concern was that the pretrial publicity, especially in the form of extrajudicial comments by the parties, would taint the unsequestered jury already impaneled in *Edwards*, as well as the pool from which the juries in the other two cases would be drawn. This, too, was an entirely appropriate concern. "Extrajudicial comments on, or discussion of, evidence which might never be admitted at trial and ex parte statements by counsel [or parties] giving their version of the facts obviously threaten to undermine [the] basic tenet" that the outcome of a trial must be decided by impartial jurors. *Gentile*, 111 S.Ct. at 2743.

Driving these concerns was the district court's general observation that "the parties in this case have already demonstrated a desire to manipulate media coverage to gain favorable attention." As noted above, during the period in which the district court vacated the gag order so that Brown could pursue his re-election campaign, some of the defendants released to the press recordings and transcripts of recordings of wiretapped conversations, which had previously been subject to the order, and participated in "extensive interviews" while playing the recordings. During a discussion of the tape episode at the November 18, 1999

status conference, one of the defendants (not Brown) who had released a tape explained his actions by stating that he had merely seized "a window of opportunity." A lawyer for the government then suggested that he would match any attempts by the defendants to gain an upper hand in the media coverage of the case.

Based on all of these developments, the district court found it clear "that both the government and the defendants are prepared to 'try this case in the press' and would attempt to use the media to influence the potential jury pool and create a prejudicial media atmosphere, if permitted." The court emphasized that it "cannot and will not permit this to happen." Having reviewed the pretrial record, we conclude that there is a reasonable basis for the district court's concern. The enormous local and national publicity surrounding the cases, the presence of three related trials, which created a heightened and somewhat unique danger of tainting any one of the three juries, as well as the parties' self-proclaimed willingness to seize any opportunity to use the press to their full advantage, justified the district court's conclusion that there was at least a "substantial likelihood" that allowing further extrajudicial statements by the parties would materially prejudice the court's ability to conduct a fair trial.

2. Narrowness of the Order

It is axiomatic that the limitation on First Amendment freedoms must be "no greater than is essential to the protection of the particular governmental interest involved." *Procunier v. Martinez*, 94 S.Ct. 1800, 1811 (1974). We find that the gag order in the present case is sufficiently narrow to eliminate substantially only that speech having a meaningful likelihood of materially impairing the court's ability to conduct a fair trial.[17] First, we observe that the district court

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[17]Under the circumstances here Brown's attack on the order in this respect is essentially facial and in such a context complained of "'overbreadth . . . must not only be real, but substantial as well, judged in

did not impose a "no comment" rule, but instead left available to the parties various avenues of expression, including assertions of innocence, general statements about the nature of an allegation or defense, and statements of matters of public record. The district court also made special allowances for Brown's re-election campaign by lifting most of the order (with the exception of the wire tap recordings) for the duration of the campaign. Unlike the defendant in *Ford*, who could not comment on his indictment during his re-election campaign because of a court-imposed gag order, *see Ford*, 830 F.2d at 600, Brown was able to answer, without hindrance, the charges of his opponents regarding his indictment throughout the race. We do not find compelling Brown's argument that his newly re-elected position as Insurance Commissioner requires him, for the good of the state insurance industry and the people of Louisiana, to engage in the same unfettered dialogue about the charges pending against him. The urgency of a campaign, which may well require that a candidate, for the benefit of the electorate as well as himself, have absolute freedom to discuss his qualifications, has passed. Accepting Brown's argument would essentially create an exception to gag orders for any trial participant holding elected office or any position of public importance. We see no reason why Brown cannot continue to perform his duties as Insurance Commissioner by assuring the public and various insurance companies that he will prevail at trial. "Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." *Cobbledick v. United States*, 60 S.Ct. 540, 541 (1940).

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relation to the . . . [order's] plainly legitimate sweep.'" *J&B Entertainment Inc. v. City of Jackson*, 152 F.3d 362, 366 (5th Cir. 1998) (quoting *Broadrick v. Oklahoma*, 93 S.Ct. 2908, 2917-18 (1973)).

Second, despite Brown's arguments to the contrary, the order provides sufficient guidance regarding the nature of the prohibited comments. A restraining order of any type is unconstitutionally vague if it fails to give clear guidance regarding the type of speech that an individual may not utter. *See Smith v. Goguen*, 94 S.Ct. 1242, 1246-47 (1974) (cited in *Levine*, 764 F.2d at 599). The order in the present case does not suffer from such a shortcoming. It specifically designates "[s]tatements or information intended to influence public opinion regarding the merits of this case" as matters the parties may not share with the public media. We see no reason to believe that the parties in this case would not understand the meaning of these words. *See Levine*, 764 F.2d at 598-99 (finding that an order barring trial participants from making any statements to members of the news media concerning any aspect of this case that bears "upon the merits to be resolved by the jury" not vague).

Moreover, Brown's complaints that the order is overbroad or too vague are weakened by the fact that he did not take the district court up on its invitation to submit suggested modifications of the order. Instead, Brown insisted that he be completely exempt from any restrictions on extrajudicial comments. He never sought clarification. If he had been so concerned about the scope of the order, he should have communicated those concerns to the district court as he was given ample opportunity, and indeed invited, to do.

In short, while the language of the order is arguably somewhat broad, under the circumstances we do not find it to be so vague or overinclusive as to unjustifiably trammel on Brown's free speech rights.

C. Least Restrictive Means

In *Nebraska Press*, the Supreme Court indicated that "[t]he more difficult prospective or predictive assessment that a trial judge must make" when considering whether to

impose a gag order as a remedy for potentially prejudicial pretrial publicity "calls for a judgment as to whether other precautionary steps will suffice." 96 S.Ct. at 2805. This requirement appears to comport with the more general First Amendment principle that restrictions on speech should employ the least restrictive means possible. *See, e.g., Procunier*, 94 S.Ct. at 1811. As noted above, *Sheppard* suggested several alternatives to imposing prior restraints on the press, such as change of venue, jury sequestration, "searching" voir dire, and "emphatic" jury instructions, as tools for dealing with extensive pretrial publicity; *Nebraska Press* held that trial courts should use these alternatives, whenever possible, instead of gagging the press. *See Nebraska Press*, 96 S.Ct. at 2805.

The district court did not on the record explicitly discuss and reject each of the *Sheppard* options before imposing the gag order on Brown and the other trial participants; this order was, of course, another of the less restrictive alternatives proposed in *Sheppard*. While it is undoubtedly good judicial practice for district courts to explicitly set forth on the record their consideration of such matters, we do not believe that this shortcoming requires us to vacate the present order. *See Nebraska Press*, 96 S.Ct. at 2806 (in the absence of such a discussion by the trial court, examining the record to determine the efficacy of measures short of a gag order on the press); *Russell*, 726 F.2d at 1010 (concluding that the district court's order was not "rendered unconstitutional because of the alleged lack of an 'evidentiary finding' or of specific, articulated findings" and reviewing the record to find support for the determination that a gag order on trial participants was necessary). *But see Dow Jones*, 842 F.2d at 611 (requiring that "each [alternative measure] must be explored and ultimately rejected as inadequate – individually and in combination – as a remedy for prejudicial pretrial publicity before a restraining order [on the press] is entered").

The record sufficiently supports the district court's clearly implied conclusion that the other measures suggested by *Sheppard* and *Nebraska Press* would be inappropriate or insufficient to adequately address the possible deleterious effects of enormous pretrial publicity on this case and the two related cases. As the Supreme Court noted in *Gentile*, even "[e]xtensive voir dire may not be able to filter out all of the effects of pretrial publicity, and with increasingly widespread media coverage of criminal trials, a change of venue may not suffice to undo the effects of statements" by trial participants. *Gentile*, 111 S.Ct. at 1075 [sic]. Like voir dire, "emphatic" jury instructions may be at best an imperfect filter, and would also fail to address the threat of a "carnival atmosphere" around the trial. *See Levine*, 764 F.2d at 600. Delaying the commencement of the trial and sequestering the jury both impose well-known and serious burdens in their own right and would not have prevented, in any meaningful way, the infection of jurors in the two related trials. For example, even if the district court had sequestered the jury in this case, the comments by the parties would still threaten to prejudice the jurors in the other trials. In short, all of these options carry with them significant costs without addressing the root cause of the district court's concern. *See Gentile*, 111 S.Ct. at 1075 [sic] (noting that "voir dire, change of venue, or some other device . . . entail serious costs to the system [which] [t]he State has a substantial interest" in avoiding). The *Sheppard* Court observed that when considering how to "cure" the effects of pretrial publicity, a trial court's overriding object must be to institute "those remedial measures that will prevent the prejudice at its inception." *Sheppard*, 86 S.Ct. at 1522. In light of the parties' and attorneys' demonstrated enthusiasm for using the press to their utmost advantage, the district court made a reasoned and reasonable decision to focus its prophylactic attempt to avoid prejudicing the three related trials on the trial participants. Given the difficult and "necessarily speculative" task of trying to prevent prejudice that has not yet occurred – a task

that involves the weighing of "factors unknown and unknowable" – we do not believe that the district court erred in imposing the gag order on Brown and the other trial participants in this case. *Nebraska Press*, 96 S.Ct. at 2804.

**Conclusion**

The district court's denial of Brown's motion to modify or vacate the order is AFFIRMED.

[Filed: February 21, 2000]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 00-30144

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In Re: JAMES HARVEY BROWN

Also known as Jim Brown

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Petition for Writ of Mandamus to the

United States District Court for the

Middle District of Louisiana

(99-151-B-M2)

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Before SMITH, BARKSDALE and PARKER, Circuit Judges.

BY THE COURT:

For following reasons, IT IS ORDERED that the petition for writ of mandamus is DENIED.

Pursuant to its local rules of criminal procedure, the district court has proscribed certain extrajudicial comments by counsel and the parties concerning this and two related criminal proceedings, including one being presently tried, *United States v. Edwards,* No. 98-CR00165 (M.D. La.). For this proceeding, set for trial in June 2000, or alternatively, May, defendant James Brown, Insurance Commissioner for the State of Louisiana, by interlocutory appeal, filed 7

February 2000, and separately by petition for writ of mandamus, originally filed on 2 February, and re-filed on 10 February, seeks to have the order vacated.

"[M]andamus is an extraordinary remedy reserved for those situations in which [, *inter alia*,] . . . the trial court has so clearly and indisputably abused its discretion as to compel prompt intervention by the appellate court". *United States v. Mulderig*, 120 F.3d 534, 539 (5th Cir. 1997) (citation and quotations marks omitted), *r'hg and suggestion for r'hg en banc denied*, 127 F.3d 36 (5th Cir. 1997), *cert. denied*, 523 U.S. 1071 (1998). Moreover, "[w]e shall *not* issue a writ of mandamus if the petitioner can obtain the relief requested on direct appeal". *Id.* (emphasis added). Both independent limitations on granting mandamus relief apply here.

First, Brown has appealed. By separate order for that proceeding, issued simultaneously with this order, his appeal has been expedited, including being placed on our April Calendar. *United States v. Brown*, No. 00-30134 (5th Cir.). In this regard, the appeal in *United States v. Edwards*, No. 99-31130, is on our court's March calendar, for consideration without oral argument.

For the other independent basis for denying mandamus, the district court has, in the light of publicity surrounding these proceedings and related matters, determined that the order at issue is necessary to ensure a fair trial. This notwithstanding, it lifted the order from late September to late November 1999, so that is would *not* impede Brown's re-election campaign. He was re-elected. Moreover, by 3 February 2000 order, it has clarified its order. In sum, the requisite clear and indisputable abuse of discretion is *not* present.

IT IS FURTHER ORDERED that petitioner's motion for expedited consideration of the petition for writ of mandamus is GRANTED.

IT IS FURTHER ORDERED that the motion of The Times-Picayune Publishing Corporation, The Associated Press, Capital City Press, Inc., Gannett River States Publishing Corporation, New Orleans Hearst Argyle, Inc. (WDSU-TV), WGNO Inc., WWL-TV Inc., Emmis Television Broadcasting, L.P. (WWUE-VTV[)], and The Louisiana Press Association to file amicus curiae brief is [sic] support of the petition for writ of mandamus is GRANTED.

ROBERT M. PARKER, Circuit Judge, dissenting.

I would grant the petition for mandamus. The district court's "gag-order" is effectively a "no discussion" order regarding the case. The defendant, an elected public official, is unable to respond to the charges and public statements made against him. The prosecution has the luxury of well-publicized allegations against Brown, aided in large part by the government's release of sensitive wire tap material to the press and various public announcements regarding the "factual basis" for the indictment. By forbidding Brown to respond to these public statements, the order violates the Constitution's prohibition on prior restraints of speech.

As a prior restraint, the district court's order is subject to a strong presumption against its constitutionality and "the burden of justification is therefore heavier than that imposed in cases involving only subsequent restrictions on freedom of expression." *Bernard v. Gulf Oil, Co.*, 619 F.2d 459, 473 (5th Cir. 1980); *see also Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) (holding that even in the context of a criminal defendant's right to a fair trial, prior restraint is "the most serious and the least tolerable infringement on First Amendment rights").

In *United States v. Ford*, 830 F.2d 596 (6th Cir. 1987), the court noted that a criminal defendant's interest is responding "to the charges and to the associated adverse publicity . . . is at a peak" when he is "awaiting trial in a controversial case [and] has the full power of the government arrayed against him and the full spotlight of media attention focused upon him." *Ford*, 830 F.2d at 599; *see also* Monroe H. Freedman & Janet Starwood, *Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys; Ratio Decidendi v. Obiter Dictum*, 29 STAN. L. REV. 607, 618 (1977) (arguing that an "accused has a First Amendment right to reply publicly to the prosecutor's charges, and the public has a right to hear that reply, because of its ongoing concern for the integrity of the criminal justice system and the need to hear from those most directly affected by it").

The district court cites the sensational nature of the issues in this case and the potential effect public discussion of the case could have on jury pools for this case and related trials. However, measures such as gag orders are seldom justified in the context of litigation. As noted by the 6th Circuit in *Ford*:

> [S]uch broadly based restrictions on speech in connection with litigation are seldom, if ever, justified. Trail judges, the government, the lawyers and the public must tolerate robust and at times acrimonious or even silly public debate about litigation. The courts are public institutions funded with public revenues for the purpose resolving public disputes, and the right of publicity concerning their operations goes to the heart of their function under our system of civil liberty. The courts have available other less restrictive approaches for insuring a fair trial.

*Ford*, 830 F.2d at 599.[1] This reasoning takes on added importance when the person seeking to exercise his freedom to be free from prior restraints is the defendant.

> Indeed, circumstances will virtually never occur in which the right to freedom of speech could be of more importance to an individual than in the course of criminal proceedings. The prosecutor is privileged to publish to the world – including the defendant's family, friends, neighbors, and business associates – what in almost any other context would constitute libel per se. The indictment may contain detailed charges of the most heinous conduct, and the delay before ultimate vindication may be many months, if not years. In the meantime, entirely apart from the proceedings in court, the good name earned during a lifetime can be demolished. There can be no more pressing occasion, therefore, for immediate, effective, public rebuttal.

Freedman & Starwood, *supra*, at 613. I think that Brown's status as an elected official provides further justification for his being able to publicly respond to the charges made against him. Public officials have not only their personal reputation to defend, but also their public persona. This latter concern dramatically effects [sic] a public official's ability to perform his duties to the public.

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[1] "Prior restraints are the most drastic, but not necessarily the most effective, judicial tool for enforcing the right to a fair trial. If any method other than prior restrain can effectively be employed to further the governmental or private interest threatened here, then the order is invalid." *Bailey v. Systems Innovation, Inc.*, 852 F.2d 93, 98-99 (3d Cir. 1988) The district had a number of alternative available to protect against this perceived tainting of the jury pool, including change of venue, trial postponement, probing *voir dire*, emphatic jury charges or sequestration. "It merely imposed the most draconian remedy possible – a direct prior restraint." *Id.* at 100.

Finally, the government has already tilted the scales in its favor with public statements about the defendant. As noted above, Brown's "interest in replying to the charges and the associated adverse publicity . . . is at a peak" because the full spotlight of media attention along with the full weight of the government is upon him and [sic] *Ford*, 830 F.2d at 599.[2] Brown's hands are tied by the district court's order that effectively limits his public comments to "I'm not guilty."

For the foregoing reasons, I would grant the petition for mandamus. I dissent.

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[2]The government argues that permitting Brown to respond to the charges and statements made by the prosecutor will unfairly prejudice their case against the defendant. Notwithstanding my serious reservations as to the validity of this argument, that allowing Brown to defend himself publicly "may result in overall publicity that is somewhat more favorable to the defendant . . . does not result in an 'unfair' trial for the government. . . . To the extent that publicity is a disadvantage for the government, the government must tolerate it. The government is our servant, not our master." *Ford*, 830 F.2d at 600.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA CRIMINAL
VERSUS N[o] 99-151-B-M2
JAMES HARVEY BROWN, ET AL.

RULING ON DEFENDANT'S MOTION TO MODIFY THE COURT'S PRIOR ORDER

**1. Background**[1]

Defendant Jim Brown has filed a motion to lift or modify the order previously issued by the Court which prohibited the trial participants from making certain extra-judicial statements while the case was pending before the Court.[2] In addition, Brown has requested that the Court consider his motion on an expedited basis.[3]

On September 24, 1999, the Court issued an order to ensure that all parties would receive a fair and impartial trial.[4] This order prohibited the parties, their attorneys, and all potential witnesses from giving extrajudicial statements that could "interfere with a fair trial or prejudice any

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[1]Since oral argument was held by the Court, defendant Brown has filed a Petition for a Writ of Mandamus with the U.S. Fifth Circuit Court of Appeals. In re: James Harvey Brown, Docket No. 00-30114. Brown has requested that the appellate court direct this Court to vacate its prior order as to defendant Brown. In addition, a similar issue in the *Edwards I* case is presently before the appellate court. U.S. v. Edwards, Et Al., Docket No. 99-33130.

[2]Rec. Doc. No. 57. This order has been referred to by the parties as a "gag" order.

[3]Rec. Doc. Nos. 59, 72.

[4]Rec. Doc. No. 2.

defendant, the government or the administration of justice."[5] The parties, however, were not prohibited from discussing, without elaboration: (1) the general nature of the allegations or defenses in this case; (2) information contained in the public record; (3) trial scheduling information; (4) any matters of public record in the case. In addition, parties were not prohibited from discussing the contents or substance of any motion filed in the proceedings.[6]

While the criminal action was pending, the State of Louisiana was holding election for various statewide offices. The defendant Brown was a candidate for reelection as Insurance Commissioner. In order to ensure that the September 24, 1999 order did not interfere with this election, the Court on its own motion lifted the September 24, 1999 order. The Court took this action to protect (1) the first amendment rights of the candidates, including the defendant Brown, who were then seeking the office of Insurance Commissioner of the State of Louisiana; (2) the rights of the voters of the [S]tate of Louisiana and (3) the rights of the press to report on a pending criminal case and an on-going political campaign.[7]

Soon after the Court lifted its September 24, 1999 order in recognition of the Insurance Commissioner's race, one of the defendants released partial transcripts of recorded conversations to the press. This release created substantial media coverage. As a result, the Court issued a limited order that prohibited the parties from releasing similar transcripts or recordings of conversations to the press.[8] After the election was concluded, the Court reinstated its

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[5]Rec. Doc. No. 2, p[.] 2.

[6]Rec. Doc. No. 2, p. 2-3

[7]Rec. Doc. No. 4. The Court then issued written reasons for its September 28, 1999 Order. Rec. Doc. No. 5.

[8]Rec. Doc. No. 28.

prior order, in its entirety.[9] Defendant Jim Brown has now requested that the Court modify or vacate its prior ruling which would lift the prohibition as to him individually and permit him to make unrestricted public comments regarding this case.[10]

For the reasons set forth below as well as reasons set forth previously, defendant Brown's motion to set aside or modify the gag order is DENIED.

**2. Brown's arguments**

Brown complains that the order issued in this case amounts to a prior restraint on his first amendment rights and restricts his ability to perform his duties as Insurance Commissioner of this state.[11] Specifically, Brown contends that his inability to discuss the charges brought against him affects the "confidence of insurance regulators in other states in the competence and integrity of the Louisiana Department of Insurance."[12]

Brown also argues that prior restraint of speech is only permissible upon a showing of "clear and present" danger to a protected competing interest.[13] According to Brown, any restraint on the speech of a defendant who is also a public official is particularly unfair and restricts the official's ability to inform his constituents and contest the merits of

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[9]Rec. Doc. No. 56.

[10]The Court heard oral argument on Brown's motion on January 4, 2000. When questioned by the Court, Brown's counsel indicated that Brown's intent was only to lift the prohibition on speech as to Brown, not as to the attorneys in the case. Brown's counsel did not, however, address whether his motion was intended to lift the prohibition as to the other defendants.

[11]Rec. Doc. No. 58, p[.] 1, 5.

[12]Rec. Doc. No. 58, p. 5

[13]Rec. Doc. No. 58, p. 2.

the pending indictment.[14] Finally, Brown contends the order prevents him from maintaining the public confidence and trust necessary to effectively perform his duties as Insurance Commissioner.

**3. Government's response**

The government argues that the Court's order is necessary to preserve rights of all parties to have a fair trial. The government contends that if any of the trial participants were permitted to make unregulated pretrial comments about the case, the case would be tried in the press which "would endanger everyone's ability to obtain a fair and impartial trial by untainted jurors."[15] The government questions Brown's contention that he has sought relief from the Court's prior order to perform his duties as Insurance Commissioner. The government maintains that if the Court's order is lifted, Brown would make public comments designed to criticize the prosecution and create a prejudicial media atmosphere.[16]

The government draws a distinction between orders that limit the press's ability to report on a trial and those that limit the trial participants themselves from making public comments about the trial. When placing limits on trial participants, the government argues that the Court must only find a "substantial likelihood of material prejudice" could result from the unrestricted public comments by the participants."[17] However, if the Court's order directly restricts the press's ability to report on a matter, the

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[14]Rec. Doc. No. 58, p. 4.

[15]Rec. Doc. No. 65, p. 2.

[16]Rec. Doc. No. 65, p. 3. The government argues that Brown's motion to modify or vacate the gag order is only a "pretext" that Brown is using to engage in prosecution "bashing." Id[.], p. 3.

[17]Rec. Doc. No. 65, p. 4.

limitation must satisfy a more stringent "clear and present danger" standard.[18]

**4. The Court's prior order is justified in this case**

**A. The importance of a fair and impartial trial**

The Court must consider the effect that unrestricted public comments may have on the jury venire in this case as well as the fair trial rights of all parties. This concern is particularly important under the facts of this case where the Court is now in the process of presiding in a three month trial involving Edwin Edwards, a co-defendant in this case, who is also charged in a 34 count indictment with six other defendants. The jury in the case now being tried has not been sequestered. The *Edwards I* trial is also the subject of intense media interest and coverage.

In *Sheppard v. Maxwell*, the Supreme Court summarized the problems associated with extensive pretrial publicity, saying

> Freedom of discussions should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice. But it must not be allowed to divert the trial from the 'very purpose of a court system * * * to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures.' Among these 'legal procedures' is the requirement that the jury's verdict be based on evidence received in open court, not from outside sources. (citations omitted).[19]

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[18]Rec. Doc. No. 65, p. 4. The defendants take a different position on this point. They argue that the "clear and present danger" standard applies regardless of whether the press or trial participants are affected by the Court's order. See Rec. Doc. No. 58[,] p. 2.

[19]384 U.S. 333, 350, 86 S.Ct. 1507, 1516, 16 L.Ed. 600 (1966).

**B. The standard to be applied**

At present, the Supreme Court has not directly addressed what standard should apply to orders that limit the speech of all trial participants.[20] The lower courts are in disagreement about whether a strict "clear and present danger" standard should be applied or whether a lower "reasonable likelihood of prejudice" standard should be applied.[21] The Court's research also indicates that the Fifth Circuit has not addressed what standard should be applied to evaluate restrictions on speech when the defendant challenges the order on first amendment grounds.[22]

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[20]See, generally, Minnefor, *Looking for Fair Trials in the Information Age: The Need for More Stringent Gag Orders Against Trial Participants*, 30 University of San Francisco Law Review 95 (Fall 1995). See also, Note, *Free Press-Fair Trial: Can They be Reconciled in a Highly Publicized Criminal Case?*, 79 Georgetown Law Journal 337 (1995).

[21]The lower courts have offered different opinions about which standard should apply. For example, the Fourth Circuit has ruled that an order restricting participant speech is appropriate upon showing a "reasonable likelihood that prejudicial news prior to trial will prevent a fair trial." *In Re Russel[l]*, 726 F.2d 1007 (4th Cir. 1984). Similarly, the Tenth Circuit found that a limit on the speech of all trial participants is constitutionally permissible if there is a "reasonable likelihood of prejudicial news would make difficult the impaneling of an impartial jury and that tend to prevent a fair trial." U.S. v. Tijernia [sic], 412 F.2d 661 (10th Cir. 1969). The *Tijernia* [sic] court expressly rejected the stricter "clear and present danger standard." 412 F.2d at 666. Other courts have announced a stricter standard, however. In two different cases, the Sixth Circuit applied a strict "serious and imminent" threat standard to evaluate a restraints [sic] against participant speech. CBS v. Young, 522 F.2d 234 (6th Cir., 1975); United States v. Ford, 830 F.2d 596 (6th Cir. 1987). The Ninth Circuit announced a similar standard, finding that a trial court must find a "clear and present danger" to justify limits on participant speech. U.S. v. Levine, 764 F.2d 590 (9th Cir. 1988).

[22]In Davis v. East Baton Rouge Parish School Board, 78 F.3d[] 920, the Fifth Circuit invalidated a court ordered restriction on the speech of

The Court finds that it is not necessary to rule on which standard applies in this case. Even under the more strict "clear and present danger" standard, the facts of this case justify the Court's prior order.

The Supreme Court has explained the limits that may be placed on attorneys as trial participants. In Gentile v. State Bar[23], the Supreme Court addressed the question of whether a state bar association rule limiting the speech of attorneys was constitutional. The Supreme Court's logic is instructive:

> The speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for the regulation of the press. . . [.] Lawyers representing clients in pending cases are key participants in the criminal justice system, an the state may demand some adherence to the precepts of that system in regulating their speech as well as their conduct.[24]

The defendants attempt to distinguish *Gentile* because the Court only addressed attorney speech and did not resolve whether the same limitations were appropriate for all trial

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the defendants and their lawyers because the court's order infringed on the first amendment rights of the press. The Court did not decide what standard should be used to evaluate the restriction, finding that neither the "reasonable likelihood standard" nor a stricter "compelling necessity" standard could be met under the facts of the case. 78 F.3d at 928. Although the defendants cite *Davis* as authority for a strict scrutiny approach, Davis is inapplicable to criminal cases. The court wrote, " . . . we emphasize that this is not a criminal trial, nor even a civil jury trial. There is no possibility that publicity will prejudice potential jurors." 78 F.3d [at] 928. The impact of pre-trial publicity on the jury pool is a *primary* concern for the Court in this case. In addition, Davis focused on the First Amendment rights of the press, not the defendants.

[23]501 U.S. 1030, 111 S.Ct[.] 2720, 115 L.Ed[.] 2d 888 (1991).

[24]501 U.S. at 1031; 111 S.Ct[.] at 2722.

participants. The Court sees no reason to limit the rule set forth in *Gentile* to attorneys. Both attorneys and defendants are privy to a wealth of information that, if disclosed to the public, could readily jeopardize the fair trial rights of all parties. The parties and attorneys in this case are clearly in possession of information that could potentially disrupt the fair trial rights of all parties.[25] Irresponsible comments by the participants in this case could also jeopardize the rights of the parties who are now engaged in the trial of *Edwards I*, as well as the parties who must be tried in a third case which must be tried after defendant Brown's trial.

**5. Factors that support the Court's order**

The Court finds that a number of factors support the prior order and support the Court's decision to leave its order in place.

First, the threat of prejudice caused by extensive pre-trial publicity in this case is substantial. This case and its two companion cases have received enormous press coverage to date. Both the defendant and the government have submitted numerous examples of the extensive coverage just

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[25]The defendant also cites U.S. v. Ford, 830 F.2d 596 (6th Cir.), for the proposition that an order restricting a politician's speech is particularly unfair and unconstitutional. Rec[.] Doc. No. 58, p. 2. The Court finds that *U.S. v. Ford* is inapposite for several reasons. First, U.S. v. Ford is not controlling authority for this Court. Second, even if Ford was controlling, its logic does not support the defendant's position. *Ford* involved a political candidate who was seeking reelection and had been indicted on mail and bank fraud charges. The Sixth Circuit acknowledged that under the district [c]ourt's order, the defendant could not respond to the attacks of his political opponents or inform his constituents of his point of view during the campaign. 830 F.2d at 600. In the present case, this Court permitted Brown to respond to any comments by his political opponents by lifting the order during his campaign for Insurance Commissioner. See Rec. Doc. No[.] 4. Essentially, Brown sought and was granted the very same relief that the defendant sought in *Ford*. The Court finds that Brown's reliance on the Ford case is therefore misplaced.

this case has received in the media.[26] Unrestricted statements by the participants in this trial would only serve to increase the volume of pre-trial publicity.

Second, this trial and its inter-relation with two other high profile trials presents a unique situation that justifies the Court's present order. As noted earlier, there are two other cases pending before the Court that have also generated an enormous degree of publicity.[27] One of these cases has been in trial since January 10, 2000. As noted earlier, the jury in the case now being tried has not been sequestered. These three cases involve many of the same defendants and factually arose out of the same government investigation. The government lawyers involved in prosecuting the cases are basically the same in all three cases.[28] Because Brown's case will go to trial after the *Edwards I* trial has been competed and the third case will likely follow the Brown trial, the Court finds that an order prohibiting the parties from discussing certain parts of this case is not only important but absolutely necessary to protect the rights of all parties and to allow the Court to pick a fair and impartial jury in the two cases which must be tried at a later date. The Court finds that if defendant Brown and the other defendants were permitted to make unrestricted comments about the merits of this trial, there would be a great risk of prejudice to the jury which is now hearing *Edward I*, the potential jury pool in the next two cases as well as great danger to the fair trial rights of all parties in all three cases.

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[26]Rec. Doc. No. 57, exhibits "A" and "B"; Rec. Doc. No. 65, Exhibits 1-7.

[27]United States v. Edwin Edwards, et al., Docket No. 98-CR-165-B-1; United States v. Cecil Brown, et al., Docket No. 99-CR-171.

[28]The U.S. Attorney for the Eastern District of Louisiana is prosecuting all three of these cases.

Third, the parties in this case have already demonstrated a desire to manipulate media coverage to gain favorable attention. The Court is concerned that the parties' ability and desire to discuss this case without limitations in the press could lead to improper and prejudicial pre-trial publicity if left unrestricted. This has been amply demonstrated when the Court temporarily lifted its order during the election for Insurance Commissioner. During the time the Court vacated its order to allow the election to be held, the defendants not only released certain tapes of conversations to the media but participated in extensive interviews while playing certain tapes of wire taps which were previously covered by the Court's order. The Court discussed this topic with the parties at a status conference held on November 18, 1999. The Court firmly believes that if it lifted its present order, all the parties themselves would continue to generate prejudicial pre-trial publicity by not only releasing taped material but making other public comments designed to create a prejudicial atmosphere. It is also probable that if the defendants seek to engage in such conduct, the government would soon join them, and vice-versa. The following excerpt of a November 1999 status conference underscores the Court's belief:

> MR. JEFFRESS: WELL, I AM JUST SAYING THAT, WHEN IT SAYS STATEMENTS OR INFORMATION INTENDED TO INFLUENCE PUBLIC OPINION, NOT A POTENTIAL JURY OR THE TRIAL OF THE CASE OR SOMETHING, BUT PUBLIC OPINION REGARDING THE MERITS OF THE CASE, YOU KNOW, YOU ARE A PUBLIC OFFICIAL AND AS TO WHETHER YOU ARE REALLY GUILTY OF FIFTY-THREE COUNTS OR SOMETHING, IT IS JUST SOMETHING YOU NEED TO TALK ABOUT SOMETIMES.

THE COURT: HE CAN ALWAYS SAY – THERE'S NO ACT THAT SAYS, THERE IS NOTHING IN THERE THAT SAYS HE CAN'T DENY THAT HE IS GUILTY. HE CAN SAY HE IS NOT GUILTY EVERY DAY.

MR. JEFFRESS: I JUST WANT THE RECORD TO NOTE MY OBJECTION TO IT.

I DON'T THINK –

THE COURT: AND I AM TELLING YOU IF YOU THINK THERE IS A PROBLEM WITH HIM HANDLING HIS DUTIES, I AM PREPARED TO CONSIDER A MODIFICATION. I MODIFIED IT ONCE. A CERTAIN DEFENDANT MADE ME MODIFY IT AGAIN. THE FIRST DAY I MODIFIED THERE COME THE TAPES, YOU KNOW, AND THE TRANSCRIPTS.

**MR. EDWARDS: I SAW A WINDOW OF OPPORTUNITY.**

THE COURT: I KNOW YOU DID.

MR. EDWARDS: YOU DIDN'T GIVE ME MUCH ELSE.

THE COURT: WELL, WE ARE BEING HONEST WITH EACH OTHER. YOU KNOW, IF THE TAPES WOULD NOT HAVE COME OUT, THERE WOULD NOT HAVE BEEN A MODIFICATION. HERE COME THE TAPES. I HAVE NO IDEA WHAT'S COMING NEXT.

SO THERE IT GOES. BUT YOU DID GOOD, I MEAN, AT THE TIME THAT YOU DID IT.

**MR. PERRICONE: IT WAS JUST INCOMPLETE.**

**THE COURT: AND THAT'S WHAT I DON'T WANT. SEE, I DON'T WANT YOU TO START THROWING –**

**MR. PERRICONE: OH, I WILL.**

**THE COURT: I KNOW YOU WILL.**

**MR. JEFFRESS: THEY THROW THEM IN THE INDICTMENT.**

The preceding passage demonstrates that both the government and the defendants are prepared to "try this case in the press" and would attempt to use the media to influence the potential jury pool and create a prejudicial media atmosphere, if permitted. The Court cannot and will not permit this to happen. The Court must and will continue to remain vigilant as to the fair trial rights of all parties.

**6. The court's order is narrowly tailored**

A court's order must be narrowly tailored to prohibit only those statements that may impair the fairness of the criminal trial.[29] Defendant Brown's primary complaint is that the Courts order prevents him from properly performing his duties as Insurance Commissioner of this state. The Court finds that nothing in the present order prevents Brown from exercising his duties as an elected official. Brown is only prohibited from giving or authorizing any extrajudicial statement relating to this case that would interfere with "the administration of justice and is not a matter of pubic record."[30] Additionally, Brown is prohibited from making statements on the merits of the case designed to influence public opinion or prejudice a party. The Court finds that these narrowly drawn limits do no [sic] impact Brown's ability to perform his duties as Insurance Commissioner.

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[29]CBS v. Young, 522 F.2d 234 (6th Cir. 1975); United States v. Ford, 830 F.2d 596 (6th Cir. 1987).

[30]Rec. Doc. No. 2.

Brown complains that he is only permitted to comment on the trial by saying "he is not guilty."[31] This is not a proper characterization of the scope of the Court's order. Nothing set forth in the Court's order prohibits Brown or any other party in the case from:

(1) Stating, without elaboration or any kind of characterization whatsoever:

(a) the general nature of an allegation or defense made in this case;

(b) information contained in the public record of this case;

(c) scheduling information;

(d) any decision made or order issued by the Court which is a matter public record.

(2) Explaining, without any elaboration or any kind of characterization whatsoever, the contents or substance of any motion or step in the proceedings, to the extent such motion or step is a matter of public record in this case and any ruling made thereon to the extent that such ruling is a matter of public record.[32]

It is clear to the Court that Brown may adequately explain the nature of the present indictment as it relates to the performance of his duties.

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[31]Rec. Doc. No. 58, p. 5.

[32]Rec. Doc. No. 57.

**7. Defendant Brown's modification of the court's order**

Brown has submitted a proposed modification of the Court's prior order. Brown's proposal adopts the Court's prior order except that it does not place any limitations on defendants or potential witnesses. Although the Court welcomes suggested language from the parties on this issue, the Court does not believe that Brown's proposed modification would protect the fair trial rights of all participants. Like attorneys, trial participants have access to potentially inflammatory and prejudicial information. The Court believes that if the trial participants and witnesses were free to make unrestricted public comments about this case, the fair trial rights of all participants would be jeopardized. For that reason, the Court rejects the modification proposed by defendant Brown.

Therefore:

IT IS ORDERED that the Motion of the Defendant Jim Brown to Modify the Court's prior order is hereby DENIED.

Baton Rouge, Louisiana, this 3[rd] day of February, 2000.

/s/_____
Frank J. Polozola, Chief Judge
Middle District of Louisiana

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA
VERSUS
JAMES HARVEY BROWN
a/k/a JIM BROWN
ALFRED FOSTER SANDERS, III
a/k/a Foxy Sanders
EDWIN WASHINGTON EDWARDS
a/k/a The Governor
ROBERT ANDRE BOURGEOIS
a/k/a Bob Bourgeois
DAVID JUDD DISIERE
RONALD R. WEEMS
a/k/a Ron Weems

CRIMINAL
N[o] 99-151-B-M2

**ORDER REINSTATING COURT'S ORDER OF SEPTEMBER 24, 1999**

On September 28, 1999, the Court temporarily lifted its order of September 24, 1999, for reasons stated therein. The reasons for temporarily lifting the order will expire on November 20, 1999.

Therefore:

IT IS ORDERED that the attached order of September 24, 1999 shall become effective in its entirety on November 20, 1999, at 8:00 p.m. Central Standard Time. The Court expects all parties enumerated therein to comply with the order until further orders of this Court.

Baton Rouge, Louisiana, November 17, 1999.

/s/_____
FRANK J. POLOZOLA, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

FILED
U.S. DIST. COURT
MIDDLE DIST. OF LA.
99 SEP 24 AM 10:45
SIGN _____
RICHARD T. MARTIN
CLERK

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA
VERSUS
JAMES HARVEY BROWN
a/k/a JIM BROWN
ALFRED FOSTER SANDERS, III
a/k/a Foxy Sanders
EDWIN WASHINGTON EDWARDS
a/k/a The Governor
ROBERT ANDRE BOURGEOIS
a/k/a Bob Bourgeois
DAVID JUDD DISIERE
RONALD R. WEEMS
a/k/a Ron Weems

CRIMINAL
N[o] 99-151-B-M2

ORDER

In accordance with Local Criminal Rule 53, and in order to ensure that all parties will have a fair and impartial trial, the Court issues the following order:

IT IS ORDERED that from now until the final verdict in this case, the United States Attorney, his representatives and agents, the Federal Bureau of Investigation, its representatives and agents, the defendants, James Harvey Brown a/k/a Jim Brown, Alfred Foster Sanders, III a/k/a Foxy Sanders, Edwin Washington Edwards, a/k/a The Governor, Robert Andre Bourgeois, a/k/a Bob Bourgeois;

David Judd Disiere, and Ronald R. Weems a/k/a Ron Weems, their counsel, representatives and agents, and all potential witnesses shall not give or authorize any extrajudicial statement or interview to any person or persons associated with any public communications media or that a reasonable person would expect to be communicated to a public communications media relating to the trial, the parties or issues in this case which could interfere with a fair trial or prejudice any defendant, the government, or the administration of justice and which is not a matter of public record. Testimony given in grand jury testimony and tapes or transcripts of tapes made by any of the above parties prior to this trial are not public information. Statements or information intended to influence public opinion regarding the merits of this case are specifically designated as information which could prejudice a party.

Nothing set forth above shall prohibit any of the above parties from the following:

(1) Stating, without elaboration or any kind of characterization whatsoever:

(a) the general nature of an allegation or defense made in this case;

(b) information contained in the public record of this case;

(c) scheduling information;

(d) any decision made or order issued by the Court which is a matter of public record.

(2) Explaining, without any elaboration or any kind of characterization whatsoever, the contents or substance of any motion or step in the proceedings, to the extent such motion or step is a matter of public record in this case and any ruling made thereon to the extent that such ruling is a matter of public record.

IT IS FURTHER ORDERED that all courthouse personnel, including marshals, deputy marshals, guards, court clerks, deputy clerks, law clerks, secretaries, bailiffs and court reporters, shall under no circumstances disclose to any person, without express authorization by the Court, information relating to this case that is not part of the public records of this [C]ourt. This order specifically forbids the divulgence of information concerning arguments and hearings held in chambers or outside the presence of the public.

The Court adopts by reference herein Local Criminal Rules 53.1, 53.3, 53.4, 53.5, 53.8, 53.9, and 53.10.

Baton Rouge, Louisiana, September 24, 1999.

/s/_____

FRANK J. POLOZOLA, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA
VERSUS
JAMES HARVEY BROWN
a/k/a JIM BROWN
ALFRED FOSTER SANDERS, III
a/k/a Foxy Sanders
EDWIN WASHINGTON EDWARDS
a/k/a The Governor
ROBERT ANDRE BOURGEOIS
a/k/a Bob Bourgeois
DAVID JUDD DISIERE
RONALD R. WEEMS
a/k/a Ron Weems

CRIMINAL
N[o] 99-151-B-M2

ORDER

On September 28, 1999, the Court set aside its order of September 24, 1999, which prevented the parties, attorneys and witnesses from talking about the case. The Court did so to allow the election for Louisiana Commissioner of Insurance to be conducted without limitations imposed by the Court. The Court reserved the right to reimpose its order if the Court believed it was necessary to protect the government's and the defendants' rights to a fair and impartial trial. Since the Court lifted its order, one defendant has released transcripts of telephone calls. To avoid such occurrences in the future, the Court believes a limited order should now be issued which would only prohibit the parties from discussing matters in two limited areas. Following the election of Louisiana Commissioner of Insurance, the Court shall reissue its entire order of September 24, 1999. It is obvious from recent events which have occurred in this case that such an order will be required to ensure a fair and impartial trial.

Therefore, it is ordered:

In accordance with Local Criminal Rule 53, and in order to ensure that all parties will have a fair and impartial trial, the Court issues the following order:

IT IS ORDERED that from now until further order of the Court, the United States Attorney, his representatives and agents, the Federal Bureau of Investigation, its representatives and agents, the defendants, James Harvey Brown a/k/a Jim Brown, Alfred Foster Sanders, III a/k/a Foxy Sanders, Edwin Washington Edwards, a/k/a The Governor, Robert Andre Bourgeois, a/k/a Bob Bourgeois, David Judd Disiere, and Ronald R. Weems a/k/a Ron Weems, their counsel, representatives and agents, and all potential witnesses shall not provide copies or reproductions of any of the following items to any person or persons associated with any public communications media or that a reasonable person would expect to be communicated to a public communications media:

(1) tapes or transcripts of tapes made by any of the above parties prior to trial,

(2) materials or documents subject to discovery in this case.

IT IS FURTHER ORDERED that all courthouse personnel, including marshals, deputy marshals, guards, court clerks, deputy clerks, law clerks, secretaries, bailiffs and court reporters, shall under no circumstances disclose to any person, without express authorization by the Court, information relating to this case that is not part of the public records of this [C]ourt. This order specifically forbids the divulgence of information concerning arguments and hearings held in chambers or outside the presence of the public.

Baton Rouge, Louisiana, October 7, 1999.

/s/_____
FRANK J. POLOZOLA, CHIEF JUDGE
MIDDLE DISTRICT OF LOUISIANA

Supreme Court, U.S.
FILED
DEC 15 2000
CLERK

(2)

No. 00-277

# In the Supreme Court of the United States

JAMES HARVEY BROWN, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
*Solicitor General*
*Counsel of Record*
JAMES K. ROBINSON
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2248

## QUESTIONS PRESENTED

1. Whether petitioner's claims that the district court improperly prohibited him from making certain extra-judicial statements about his criminal prosecution have been rendered moot by his conviction and the lifting of the district court's order.

2. Whether the district court's order prohibiting petitioner from making certain extra-judicial statements about his criminal prosecution violated the First Amendment.

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# In the Supreme Court of the United States

No. 00-277

JAMES HARVEY BROWN, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 218 F.3d 415. The order of the court of appeals denying petitioner's petition for a writ of mandamus (Pet. App. 29a-34a) is unreported. The order of the district court (Pet. App. 35a-48a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on July 6, 2000. The petition for a writ of certiorari was filed on August 21, 2000, and was placed on the Court's docket on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Petitioner was indicted in the United States District Court for the Eastern District of Louisiana on one count of conspiring to commit mail fraud, wire fraud, insurance fraud, and witness tampering, in violation of 18 U.S.C. 371, 36 counts of mail fraud, in violation of 18 U.S.C. 1341, three counts of wire fraud, in violation of 18 U.S.C. 1343, two counts of insurance fraud, in violation of 18 U.S.C. 1033(a) and (d), one count of tampering with a witness, in violation of 18 U.S.C. 1512(b)(3), and 13 counts of making false statements to the FBI, in violation of 18 U.S.C. 1001.[1] The district court issued a pretrial order prohibiting the parties from making certain extrajudicial statements. The court of appeals affirmed. Pet. App. 1a-28a.

1. Petitioner was indicted on September 24, 1999. On that day, the district court *sua sponte* issued an order prohibiting the parties, lawyers, and witnesses from making certain comments to the news media about the trial. Pet. App. 50a-52a. The prohibited comments were those that "could interfere with a fair trial or prejudice any defendant, the government, or the administration of justice and which is not a matter of public record." *Id.* at 51a. The order specified that "[s]tatements or information intended to influence public opinion regarding the merits of this case are specifically designated as information which could prejudice a

[1] Petitioner was indicted with co-defendants Edwin W. Edwards and Ronald R. Weems. Three other defendants were also named in the indictment, but all three pleaded guilty to felony offenses.

party." *Ibid.* The order further provided, however, that it does not

> prohibit any of the * * * parties from the following:
>
> (1) Stating, without elaboration or any kind of characterization whatsoever:
>
> (a) the general nature of an allegation or defense made in this case;
>
> (b) information contained in the public record of this case;
>
> (c) scheduling information;
>
> (d) any decision made or order issued by the Court which is a matter of public record.
>
> (2) Explaining, without any elaboration or any kind of characterization whatsoever, the contents or substance of any motion or step in the proceedings, to the extent such motion or step is a matter of public record in this case and any ruling made thereon to the extent that such ruling is a matter of public record.

*Ibid.*

On September 28, 1999, the district court temporarily lifted the order to allow petitioner to campaign for reelection to his position as Louisiana State Insurance Commissioner. Pet. App. 3a. On October 7, 1999, after one or more defendants released recordings of conversations relevant to the prosecution, the district court prohibited the parties from releasing recordings of conversations before trial. *Id.* at 53a-55a. The next week, the district court explained that it had entered that order "to stop an avalanche of both government

and defendants picking out tapes and start playing all these tapes on radio and television." See *id.* at 4a. The court asked the parties to suggest modifications to the order, but no one did so. *Ibid.*

On November 17, 1999, the district court reimposed the original restrictions on extrajudicial comments, effective when the polls closed on November 20. Pet. App. 49a. When petitioner objected, the district court said that it believed that the order was necessary in light of the considerable publicity surrounding the trial, but the court emphasized its willingness to modify the order. See *id.* at 4a. Petitioner moved to vacate the order, and, following a hearing on January 4, 2000, the district court asked the parties to submit proposed modifications to the order. *Ibid.* Petitioner did not suggest any ways in which the scope of the prohibited comments could be made narrower, but urged that the order be applied only to counsel, not to defendants or witnesses. *Ibid.*

The next month, the district court issued an opinion denying petitioner's request to limit the order to lawyers. Pet. App. 35a-48a. In its opinion, the court noted that there was some disagreement in the lower courts on whether an order limiting the speech of trial participants had to meet a "'clear and present danger' standard," or "whether a lower 'reasonable likelihood of prejudice' standard should be applied." *Id.* at 40a. The court did not resolve that issue because, "[e]ven under the more strict 'clear and present danger' standard, the facts of this case justify" the court's order. *Id.* at 41a. The court explained that there was a substantial threat of prejudice because of the "enormous press coverage to date"; the case was "unique" because of its interrelation with two other prosecutions involving many of the same defendants that had also generated a large

amount of publicity; and "the parties in this case have already demonstrated a desire to manipulate media coverage to gain favorable attention." *Id.* at 42a-44a. The court concluded that the order was narrowly tailored to protect the fairness of the trial because it prohibited only "statements on the merits of the case designed to influence public opinion or prejudice a party." *Id.* at 46a. It further concluded that the order could not be limited to trial counsel because "[l]ike attorneys, trial participants have access to potentially inflammatory and prejudicial information." *Id.* at 48a.

2. Petitioner petitioned the court of appeals for a writ of mandamus to vacate the district court's order restricting extrajudicial comments by trial participants. The court of appeals denied the petition, on the ground that petitioner's appeal of the order had been expedited and that "the requisite clear and indisputable abuse of discretion [by the district court] is *not* present." Pet. App. 30a.

3. The court of appeals affirmed the district court's denial of petitioner's motion to modify or vacate the order. Pet. App. 1a-28a. After determining that it had jurisdiction to consider petitioner's appeal under the collateral order doctrine, *id.* at 5a-10a, the court of appeals rejected petitioner's claim that the order violated his First Amendment rights. The court stated that, "[w]hile this case presents a somewhat close call, we conclude that the gag order is constitutionally permissible because it is based on a reasonably found substantial likelihood that comments from the lawyers and parties might well taint the jury pool, either in the present case or one of the two related cases, is the least restrictive corrective measure available to ensure a fair trial, and is sufficiently narrowly drawn." *Id.* at 11a. The court of appeals observed that the "district court

applied the correct legal principles in entering such an order[,] and its factual conclusions are adequately supported by the record." *Ibid.*

Because the district court's order was directed at trial participants rather than the press, the court of appeals held that it was unnecessary to show a "clear and present danger" to a fair trial in order to justify the order. Pet. App. 14a-19a. The court relied (*id.* at 19a) on *Gentile* v. *State Bar*, 501 U.S. 1030, 1076 (1991), and determined that a district court may "impose an appropriate gag order on parties and/or their lawyers if it determines that extrajudicial commentary by those individuals would present a 'substantial likelihood' of prejudicing the court's ability to conduct a fair trial." Pet. App. 19a. The court of appeals held that the district court correctly limited the rights of petitioner, as well as his attorneys, to make public statements because "[t]he mischief that might have been visited upon the three related trials—primarily, jury tainting —would have been the same whether prejudicial comments had been uttered by the parties or their lawyers." *Id.* at 20a.

The court of appeals also concluded that the district court had identified a "substantial likelihood" that trial participants' extrajudicial comments would prejudice the court's ability to conduct a fair trial in petitioner's case and two related trials. Pet. App. 21a. The court of appeals pointed out that, before the district court entered its order, petitioner's case and two related cases "had attracted intense and extensive media attention." *Id.* at 22a. The court of appeals concluded that the district court was rightly concerned that the parties' unrestricted statements would increase the level of pretrial publicity and would taint the jury panels in related trials as well as the jury pool from

which petitioner's own jury would be drawn. *Ibid.* Based on the actions of the parties when the restriction on extrajudicial comments was temporarily lifted, the court below also determined that the district court had reasonably determined that the parties were "prepared to 'try this case in the press' and would attempt to use the media to influence the potential jury pool and create a prejudicial media atmosphere, if permitted." *Id.* at 23a.

The court of appeals further found that the restriction on extrajudicial comment was sufficiently narrow, that it still allowed the parties to comment on matters in the case, and that the order provided sufficient guidance as to what was prohibited. Pet. App. 23a-25a. Finally, the court of appeals determined that the district court's order employed the least restrictive means to achieve the necessary end of protecting the trials of petitioner and the related trials. *Id.* at 25a-28a.

4. On October 11, 2000, petitioner was convicted on seven counts of making false statements to an FBI agent, in violation of 18 U.S.C. 1001. The jury acquitted him on all other counts, and the jury also acquitted his co-defendants on all counts. The district court lifted its order restricting extrajudicial comment after the jury's verdict.

## ARGUMENT

1. Petitioner contends (Pet. 14-30) that the decision below improperly permitted a prior restraint on his First Amendment rights. Petitioner's arguments have been rendered moot by the completion of his trial and the district court's elimination of the order restricting extrajudicial comment. Because that order is no longer in place, and because that order had no collateral consequences that could be remedied by a decision by

this Court, there is no longer a live controversy regarding the propriety of that order.

This Court has recognized that the exception to the mootness doctrine for cases that are "capable of repetition, yet evading review," *Southern Pac. Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911), may apply to cases involving restrictions on the press. See, *e.g.*, *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 546 (1976); see also *Press-Enter. Co.* v. *Superior Court*, 478 U.S. 1, 6 (1986). The "capable of repetition" doctrine, however, is limited to cases in which "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975) (per curiam). This case does not satisfy those requirements, because there is no likelihood that the same kind of restriction on extrajudicial comments will again be imposed on petitioner. Cf. *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 105 (1983).

Petitioner was a defendant in a criminal case, not a member of the press whose access to court proceedings had been restricted. Only if petitioner's convictions are reversed on appeal would the possibility of a renewed restriction on extrajudicial comments arise at a second trial. *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. at 546. If petitioner's convictions are affirmed, he will not be retried and there would be no occasion for a renewed restriction on extrajudicial comments. Moreover, even if his convictions are reversed, a retrial would involve a very limited factual setting because his convictions involve only seven Section 1001 counts, a retrial would involve no co-defendants (and, in particular, it would not involve former Governor Edwards) because all

were acquitted, and a retrial would not pose the serious problems faced by the district court below of managing three inter-related multi-defendant criminal trials in which there was very great press interest. In addition, because the evidence and arguments of petitioner and the government in this case are now a matter of public record, there would likely be no need in the event of a retrial for a similar order limiting extrajudicial comments. In short, even should petitioner's convictions be reversed, there would likely be no need for a similar restriction on extrajudicial comments. Consequently, this case is not saved from mootness under the "capable of repetition" doctrine.

2. Even if this case were not moot, further review would be unwarranted.

a. The court of appeals held that "a district court may * * * impose an appropriate gag order on parties and/or their lawyers if it determines that extrajudicial commentary by those individuals would present a 'substantial likelihood' of prejudicing the court's ability to conduct a fair trial." Pet. App. 19a. See also *id.* at 20a (not reaching the question "whether a trial court may also impose a similar gag order based on a 'reasonable likelihood' of prejudice"). Petitioner asserts (Pet. 14) that "the courts of appeals are sharply divided on the showing necessary to impose restrictions on the extrajudicial speech of criminal defendants and witnesses." Petitioner concedes (Pet. 14-15) that the standard applied by the court of appeals is consistent with decisions of the Second, Fourth, and Tenth Circuits. See, *e.g.*, *In re Morrissey*, 168 F.3d 134, 138 (4th Cir.), cert. denied, 527 U.S. 1036 (1999); *United States* v. *Cutler*, 58 F.3d 825 (2d Cir. 1995); *United States* v. *Tijerina*, 412 F.2d 661 (10th Cir.), cert. denied, 396 U.S. 990 (1969). He argues (Pet. 15-19), however, that it is

inconsistent with "more stringent tests, requiring either a showing of 'clear and present danger' or 'serious and imminent threat' of prejudicing a fair trial" that are applied in the Third, Sixth, Seventh, and Ninth Circuits. Pet. 15 (quoting Pet. App. 18a). None of the cases on which he relies was decided since this Court's decision in *Gentile* and his claim of a conflict does not warrant review.[2]

(i) Petitioner cites (Pet. 17) the Seventh Circuit's decision in *Chicago Council of Lawyers* v. *Bauer*, 522 F.2d 242, 249 (1975), cert. denied, 427 U.S. 912 (1976). In that case, the Seventh Circuit held that a local court rule violated the First Amendment by prohibiting attorneys from making extrajudicial statements "if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice." 522 F.2d at 249. The Seventh Circuit held that "[o]nly those comments that pose a 'serious and imminent threat' of interference with the fair administration of justice can be constitutionally proscribed." *Ibid.*

In *Gentile*, sixteen years later, this Court noted that some jurisdictions had adopted the "serious and imminent threat" standard, see 501 U.S. at 1068 n.3, and it characterized that standard as one that "arguably approximate[s] 'clear and present danger.'" *Id.* at 1068. The Court then rejected the argument that extrajudicial comments may be regulated only if they satisfy that "clear and present danger" test, holding that "the

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[2] In addition, it is not clear that adoption of a higher, "clear and present danger" standard would be of assistance to petitioner. The district court explicitly concluded that "[e]ven under the more strict 'clear and present danger' standard, the facts of this case justify" the court's order. Pet. App. 41a.

speech of lawyers representing clients in pending cases may be regulated under a less demanding standard." *Id.* at 1074. Because *Gentile* explicitly rendered the holding in *Bauer* obsolete, the Seventh Circuit has not cited *Bauer* for the proposition that a "reasonable likelihood" standard is unconstitutional since this Court decided *Gentile*. There is accordingly no present conflict between the decision below and any decision of the Seventh Circuit.[3]

(ii) Petitioner argues (Pet. 15-16) that the decision of the court of appeals conflicts with the Sixth Circuit's decision in *United States* v. *Ford*, 830 F.2d 596 (1987). In *Ford*, the Sixth Circuit reversed a district court's order severely restricting the extrajudicial speech of a criminal defendant who was a sitting congressman. The restriction was exceptionally broad, prohibiting the congressman from *any* extrajudicial discussion of the case, with exceptions for a bare denial of guilt and for statements on the floor of the House or in committee. *Id.* at 597. In analyzing the case, the court of appeals held that the district court's order could be affirmed only if the forbidden statements would present a "clear and present danger." *Id.* at 600.

As petitioner notes, the Sixth Circuit applied the "clear and present danger" standard because that is the standard that this Court applied to restraints on the press in *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976), and the court "s[aw] no legitimate reasons for a lower threshold standard for individuals, including

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[3] For the same reason, the Ninth Circuit's decision in *Levine* v. *United States District Court*, 764 F.2d 590, 595 (1985), cert. denied, 476 U.S. 1158 (1986), that a restriction on extrajudicial comments may be imposed on attorneys only on a showing of "a clear and present danger or a serious and imminent threat" to the right to a fair trial was also superseded by this Court's decision in *Gentile*.

defendants, seeking to express themselves outside of court than for the press." 830 F.2d at 598. In *Gentile*, however, this Court expressly rejected the application of *Nebraska Press* to at least some trial participants, holding squarely that "the speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press in *Nebraska Press*." 501 U.S. at 1074. The Sixth Circuit has not had the opportunity to decide whether its views in *Ford* survive this Court's decision in *Gentile*. Accordingly, it cannot be said that the Sixth Circuit's decision in *Ford* represents that court's current views or that the decision of the court of appeals in this case conflicts with the Sixth Circuit's position.[4]

(iii) Petitioner also claims (Pet. 17) that the decision of the court of appeals conflicts with the Third Circuit's decision in *Bailey* v. *Systems Innovation, Inc.*, 852 F.2d 93 (1988). In *Bailey*, a trial court had entered an order restraining civil litigants from making certain extrajudicial statements that would likely be disseminated by the press "if there is reasonable likelihood that such dissemination will interfere with a fair trial." *Id.* at 96.

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[4] The uncertainty regarding the continued authority of *Ford* is also reflected in the fact that two of the three judges on the panel in that case wrote concurring opinions. Judge Krupansky wrote an opinion in which he "concur[red] in [the court's] conclusion that the order issued by the trial court in the instant case is overbroad and fails to satisfy the clear and present danger standard that has been enunciated by this circuit." 830 F.2d at 603. See also *id.* at 605 (concluding that he "concur[red] in the disposition of this case"). Judge Nelson wrote an opinion in which he "concur[red] in the judgment vacating the trial court's order," *ibid.*, and in which he did not discuss whether the trial court's order was subject to the "clear and present danger" test.

The Third Circuit held that the order violated the First Amendment, finding that such restrictions were prohibited "unless there is a clear threat to the seventh amendment right" to a fair jury trial. 852 F.2d at 100.

In requiring a "clear threat" to the fair trial right, the Third Circuit's standard does not substantially differ from the court of appeals' determination in this case that a restriction in this context is permissible if there is a showing of a "'substantial likelihood' of prejudicing the court's ability to conduct a fair trial." Pet. App. 19a. Certainly the modest difference in verbal formulation is insufficient to establish that the Third Circuit would have decided this case differently. Indeed, the Fifth Circuit's standard, like that of the Third Circuit, would likely not have been satisfied in *Bailey*, where the Third Circuit found that the district court's order was not predicated on "such massive prejudicial publicity as would threaten [the defendant's] right to a fair trial." 852 F.2d at 99. Similarly, both the Fifth Circuit's standard and that of the Third Circuit would likely have been satisfied in this case, in which the district court's restriction was premised on its well-supported finding "that both the government and the defendants are prepared to 'try this case in the press' and would attempt to use the media to influence the potential jury pool and create a prejudicial media atmosphere, if permitted." Pet. App. 23a.[5]

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[5] Even if the Third Circuit's standard were equivalent to a "clear and present danger" standard, there would still be no conflict with the decision below, for the same reasons discussed above with respect to *Ford*. The Third Circuit in *Bailey*, like the Sixth Circuit in *Ford*, relied to some extent on this Court's decision in *Nebraska Press*, see 852 F.2d at 99, although the Third Circuit did not cite *Nebraska Press* specifically in connection with its "clear threat" standard. Like the Sixth Circuit, the Third Circuit has not

(iv) Finally, the fact that none of the allegedly conflicting circuits has addressed the standard of review issue since this Court's decision in *Gentile* in 1991 suggests that petitioner is incorrect in asserting (Pet. 13) that there is an "increasing 'trend towards gagging trial participants'" that warrants this Court's review. Moreover, the paucity of recent case law on the subject also suggests that any difference in verbal formulations among the various circuits regarding the proper standard by which to assess restraints on trial participants' speech has not in practice had a substantial effect on the extent to which such restraints are imposed.

b. Petitioner also asserts (Pet. 24) that the decision of the court of appeals conflicts with decisions of other circuits regarding "whether courts must *explicitly* consider less-restrictive alternatives before imposing prior restraints" on trial participants. The court of appeals stated that "[w]hile it is undoubtedly good judicial practice for district courts to explicitly set forth on the record their consideration of such matters, we do not believe that this shortcoming requires us to vacate the present order." Pet. App. 26a. The court noted that the district court had reached a "clearly implied conclusion that the other measures * * * would be inappropriate or insufficient to adequately address the possible deleterious effects of enormous pretrial publicity on this case and the two related cases" and that "[t]he record sufficiently supports" that conclusion. *Id.* at 27a. As the court explained, "[i]n light of the parties' and attorneys' demonstrated enthusiasm for

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had the opportunity since *Bailey* to address whether a "clear and present danger" standard applicable to participants in the trial—rather than members of the press—is appropriate after this Court's decision in *Gentile*.

using the press to their utmost advantage, the district court made a reasoned and reasonable decision to focus its prophylactic attempt to avoid prejudicing the three related trials on the trial participants." *Ibid.*

In light of the court of appeals' treatment of the issue, including its stated preference for explicit findings regarding the adequacy of alternatives and its recognition of the district court's "clearly implied conclusion" that those alternatives would be inadequate, it can be expected that district courts in the Fifth Circuit will in the future make the explicit findings sought by petitioner. Accordingly, even if there were a conflict in the circuits regarding the narrow question of whether the district court must make such explicit findings, that conflict would likely affect very few cases in the future, and it would accordingly not be of sufficient continuing importance to warrant this Court's review.

In any event, the Fifth Circuit's decision stands at most for the proposition that a district court's order restricting extrajudicial comments will not be automatically reversed merely because the district court has not made explicit findings regarding alternatives. None of the cases cited by petitioner establishes that other circuits would treat a case like this under any different rule. For example, in *United States* v. *Salameh*, 992 F.2d 445 (2d Cir. 1993) (per curiam), the trial court "orally and sua sponte, without notice or opportunity for argument," *id.* at 446, issued a very broad order restricting attorneys in a criminal case from making any statements that "have anything to do with this case or that even *may* have something to do with the case," *id.* at 447 (internal quotation marks omitted; emphasis added by court of appeals). The court of appeals reversed the order, noting that "[t]he court did not make a finding that alternatives to this

blanket prohibition would be inadequate to protect defendants' rights to a fair trial before an impartial jury," that "[t]here is no indication in the record that the court explored any alternatives or at all considered imposing any less broad proscription," and that "indeed the court discouraged counsel from even proffering possible alternatives." *Ibid.* The court concluded that "[t]he record does not support a conclusion that no reasonable alternatives to a blanket prohibition exist," and it vacated the district court's order. *Ibid.* There is nothing in *Salameh* that suggests that the Second Circuit would similarly reverse a district court order in a case like this, in which the restriction is narrower, in which the trial court reached a "clearly implied conclusion" that alternatives would be inadequate, and in which "[t]he record sufficiently supports" that conclusion.

The other cases cited by petitioner similarly fail to support the proposition that a district court's failure to make express findings regarding the adequacy of alternatives is sufficient, alone, to require reversal of an order limiting the extrajudicial comments of trial participants. In each of the cases cited by petitioner (Pet. 26-27), the court of appeals found that there were substantive defects in the order under review, not merely a failure to make express findings that were implicit in the district court's action. See *Bailey*, 852 F.2d at 99 ("[E]ven devoid of specific findings, the record here convinces us that the first amendment is violated by the district court's order."); *United States* v. *Ford*, 830 F.2d at 600.[6] None of the cases establish that

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[6] The other case cited by petitioner, *CBS* v. *United States District Court*, 729 F.2d 1174 (9th Cir. 1984), involved an injunction against the broadcast of a tape by a television network, not a

the failure to make express findings is alone sufficient to require reversal.

c. Finally, petitioner asserts (Pet. 28) that "the gag order approved by the Fifth Circuit is unconstitutionally overbroad." Further review would not be warranted to address the particular application of the court of appeals' legal standard to the facts of this case. In any event, none of the cases cited by petitioner suggests that the order in this case would have been viewed as overbroad in any other circuit. Unlike most of the cases cited by petitioner, which involved orders that prohibited "any statements to members of the news media," *Levine* v. *United States District Court*, 764 F.2d 590, 598 (9th Cir. 1985), cert. denied, 476 U.S. 1158 (1986), or any statements that "have anything to do with this case or that even *may* have something to do with the case" *Salameh*, 992 F.2d at 447 (internal quotation marks omitted; emphasis added by court of appeals), the order in this case provided both a much narrower prohibition of statements that "could interfere with a fair trial or prejudice any defendant" and a road map of the types of statements that the parties

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limitation on the extrajudicial comments of trial participants. In addition, the court of appeals in that case vacated the injunction on the ground that it rejected "both the district court's contention that dissemination of the tapes was likely to prejudice the defendant's right to a fair trial and its contention that traditional means of dealing with such prejudice—voir dire and jury instructions, for instance—were inadequate." *Id.* at 1183. Even with respect to the adequacy of the alternatives, the court's ultimate conclusion was that "a showing has not been made that 'there is absolutely no method . . . to remove the taint upon the minds of potential jurors' which could possibly result from release of the government tapes.'" *Ibid.* In this case, by contrast, the court of appeals noted that the "[t]he record sufficiently supports" the conclusion that the available alternatives were inadequate.

could make, including statements giving "the general nature of an allegation or defense," "information contained in the public record," and "the contents or substance of any motion or step in the proceedings, to the extent such motion or step is a matter of public record." Pet. App. 51a. Moreover, as the court of appeals explained, petitioner's "complaints that the order is overbroad or too vague are weakened by the fact that he did not take the district court up on its invitation to submit suggested modifications of the order," but instead merely "insisted that he be completely exempt from any restrictions on extrajudicial comments." *Id.* at 25a. The court of appeals correctly held that "[i]f [petitioner] had been so concerned about the scope of the order, he should have communicated those concerns to the district court as he was given ample opportunity, and indeed invited, to do." *Ibid.*

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 00-277

IN THE

# Supreme Court of the United States

JAMES H. BROWN,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent*.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

## REPLY BRIEF OF PETITIONER

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## REPLY BRIEF FOR PETITIONER

Under settled principles, petitioner's challenge to the gag order is not moot. The issues presented are important, timely, and frequently encountered by the lower courts. Contrary to the government's claim, the conflicts among the circuits – which were acknowledged by the court of appeals, the district court, *and* the government in the proceedings below (Pet. App. 40a n.21; 17a-19a; 26a; Gov't C.A. Br. 25 (noting circuit "conflict" involving "divergent views about trial courts' powers" to restrict "trial participants[']" speech)) – are real. Review is warranted to decide under what circumstances, if at all, a person accused in a highly publicized indictment may be enjoined on pain of contempt from speaking publicly about the charges against him.

**1. This Case Presents a Live Controversy.** The government errs in contending (Opp. 8-10) that the possibility of a retrial on the false statement charges is too remote to preserve a live controversy under the "capable of repetition" doctrine. This Court's decision in *Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539 (1976), conclusively disposes of that argument. There, the Court squarely held a challenge to the constitutionality of a gag order in a criminal case presented a live controversy although the order had been lifted following conviction. *Id.* at 546. The Court explicitly held that the possibility of retrial sufficed to make the controversy "capable of repetition" (*id.*):

> if [the] conviction is reversed by the Nebraska Supreme Court and a new trial ordered, the District Court may enter another restrictive order to prevent a resurgence of prejudicial publicity before [the defendant's] retrial.

Although the government asserts that the holding of *Nebraska Press* is limited to media challenges (Opp. at 8), the Court's rationale would apply to challenges by the accused because it explicitly relies on the prospect of a

retrial in the accused's *own* case. 427 U.S. at 546. The opinion tellingly avoids reliance on the press' status as "repeat players" likely to be subject to restrictions in future cases. *Compare Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982) ("It can reasonably be assumed that Globe, as the publisher of a newspaper serving the Boston metropolitan area, will someday be subjected to another [restrictive] order ...."); *Gannett Co. v. DePasquale*, 443 U.S. 368, 377-8 (1979) (same). Here, as in *Nebraska Press*, the very real possibility of retrial[1] is sufficient to ensure the presence of a live controversy.

The government's other attempts to distinguish *Nebraska Press* likewise fail. Its claim that a gag order would be unnecessary at retrial because evidence and arguments are already a part of the public record (Opp. 9) would have been equally true in *Nebraska Press*, where the trial court explicitly sought to limit disclosure of specific information (427 U.S. at 543-44) that was then revealed at trial. Nevertheless, the possibility that dissemination of the information would be restricted before retrial was sufficient to maintain a live controversy. *Id.* at 546. Here, by contrast, the gag order was designed not to control the dissemination of particular information (Pet. 24) but to prevent defendants from "gain[ing] favorable attention" from the media. Pet. App. 44a. The court's concerns in that regard would

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[1] Petitioner's pending new trial motion is scheduled for argument January 17, 2001. His motion raises several claims of prejudicial error during the trial, most notably the claim that he was never allowed to see, or even inquire on cross-examination about, the notes taken by the FBI agent during the interview that was the basis for the false statement charges, notwithstanding Rule 16's unequivocal requirement that "the government *must disclose* . . . *any* written record containing the substance of any relevant oral statement made by the defendant . . . ." Fed. R. Crim. P. 16(a)(1)(A) (emphasis added). *See United States v. Molina-Guevara*, 96 F.3d 698, 705 (3d Cir. 1996) (Rule 16 requires production of "handwritten notes of [defendant's] interview"); *accord United States v. Carucci*, 183 F.R.D. 614, 615 (S.D.N.Y. 1999).

presumably be every bit as pronounced at a retrial.[2] The government's fantastic assertion that the retrial of a statewide elected official for lying to the FBI would not attract significant publicity (Opp. 9) is demonstrably false, as shown by the tremendous publicity petitioner's case continues to receive long after Edwin Edwards' exit.[3]

The government is arguing for nothing less than a *complete bar* on Supreme Court appellate review of gag orders involving persons under indictment. Because "these orders are by nature short-lived" (*Nebraska Press*, 427 U.S. at 547), *no* gag order will be in force long enough to permit Supreme Court review on anything other than an emergency petition for extraordinary relief.[4] The gag order here was inevitably lifted before this Court could address it on the merits, despite every attempt to expedite review. Petitioner promptly moved to vacate the gag order and twice sought expedited ruling by the district court. Pet. 8. When no

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[2] Reimposition of the gag order is especially likely in view of the rising tide of secrecy in the Middle District of Louisiana, where such extraordinary measures as gag orders, widespread sealing of documents, anonymous juries, and nonpublic voir dire are increasingly common. *See, e.g.*, *The Public's Right to Know*, Times-Picayune, Oct. 15, 2000, at B6; S.L. Alexander, *Their Day in Court*, Quill, June 2000, at 11-13.

[3] *E.g.*, Brett Barrouquere, *Prosecutors say Brown doesn't deserve new trial*, The Advocate, Dec. 5, 2000, at 2B; *Jim Brown says he's doing same work*, The Advocate, Nov. 6, 2000, at 2B; Steve Ritea, *Brown attorney asks for new trial*, Times-Picayune, Nov. 2, 2000, at 1B; John Maginnis, *FBI Wins Game of Gotcha*, Gambit, Oct. 19, 2000, at 11; Sam Hanna, *Brown's political career ends*, Ouachita Citizen, Oct. 19, 2000, at 4A; John Maginnis, *Feds Get Their Man: Lying counts were prosecutors' insurance*, La. Political Fax Weekly, Oct. 13, 2000, at 1.

[4] "Mandamus does not provide adequate review" of gag orders because "[i]t is a prerogative writ discretionary in nature and does not guarantee a remedy." *Proctor & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 224 (6th Cir. 1996). Nor may the accused challenge a gag order by violating it and being held in contempt. *Maness v. Meyers*, 419 U.S. 449, 458 (1975) (sole remedy is to appeal, not to violate order).

ruling was forthcoming after a month, petitioner sought mandamus in the Fifth Circuit. *Id.* When the district court ruled, petitioner immediately filed an expedited appeal. The court of appeals did not rule until more than seven months after petitioner first challenged the gag order and just six weeks before the scheduled trial date. Petitioner promptly sought certiorari prior to trial, but the government delayed filing its opposition for three months. Unless cases such as this one come within the "capable of repetition" doctrine, they will likely forever escape this Court's appellate review.

**2. *Gentile* Did Not Affect the Longstanding Circuit Split Implicated Here.** The government asserts (Opp. at 10-13) that this Court's opinion in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), undermined decisions calling for scrutiny of gag orders on litigants under the "clear and present danger" and "serious and imminent threat" standards. Accordingly, the government suggests (Opp. 12; *id.* 13-14 n.5) that the Third, Sixth, Seventh, and Ninth Circuits may reconsider their decisions in light of *Gentile*. In fact, the decade since *Gentile* has provided ample time for those courts to revisit their decisions, and they have shown no inclination to do so – indeed, they and their constituent district courts continue to apply the very holdings the government claims to be infirm. The government can cite no authority for the proposition that *Gentile* undermined these rulings for the simple reason that *Gentile* involved the distinctly different question of regulating extrajudicial comments by *lawyers*. It has not been viewed as restricting the First Amendment rights of the accused.

In rejecting the claim that the extrajudicial statements of lawyers could be regulated only if they satisfied the "clear and present danger" test, this Court in *Gentile* held that "the speech of *lawyers representing clients* in pending cases may be regulated under a less demanding standard." 501 U.S. at 1074 (emphasis added). The Court's decision critically depended on lawyers' status as officers of the court and

members of a regulated profession, which subjects them to restrictions inapplicable to laypersons. The Court could hardly have been more explicit that its holding was limited to restrictions on the speech of lawyers, and did *not* in any way pass on the constitutionality of restrictions on litigants.[5]

Unsurprisingly, then, courts have recognized that *Gentile's* holding has no implications for the speech rights of nonlawyers involved in litigation. *See, e.g., News-Journal Corp. v. Foxman*, 939 F.2d 1499, 1515 n.18 (11th Cir. 1991) ("[t]he distinctions between" a gag order directed at trial participants "and *Gentile* are significant"); *California First Amend. Coalition v. Lungren*, 1995 U.S. Dist. LEXIS 11655, *24-25 (N.D. Cal. Aug. 9, 1995) (declining to apply *Gentile* to gag order on witnesses because "lawyers are subject to special regulation"); *South Dakota v. Springer-Ertl*, 610 N.W. 2d 768, 774 (S.D. 2000) ("the public and the press have fewer speech restrictions than lawyers participating in judicial proceedings"). Indeed, commentators have recognized that "[t]he *Gentile* case would appear to *support*" the conclusion that "an attorney's role as a court officer will subject the attorney to speech regulations different from non-attorney participants such as parties and witnesses." Gerald T. Wetherington et al., *Preparing for the High Profile Case: An Omnibus Treatment for Judges and Lawyers*, 51 Fla. L. Rev. 425, 466 (1999) (emphasis added). Numerous courts and commentators continue to remark on this well

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[5] *See, e.g.*, 501 U.S. at 1071 ("lawyers in pending cases [are] subject to ethical restrictions on speech to which an ordinary citizen would not be"); *id.* at 1074 ("As officers of the court, . . . attorneys have a fiduciary responsibility not to engage in public debate that . . . will obstruct the fair administration of justice"); *id.* at 1076 (noting state interest "in preventing prejudice to an adjudicative proceeding by those who have a duty to protect its integrity"); *id.* at 1081-82 (O'Connor, J., concurring) ("Lawyers are officers of the court and, as such, may legitimately be subject to ethical precepts that keep them from engaging in what otherwise might be constitutionally protected speech.").

recognized split without so much as hinting that *Gentile* might have affected it in any way.[6]

The government cites no authority for the proposition that *Gentile* undermined these decisions because no such authority exists. Long after *Gentile*, the Sixth Circuit continues to rely on *United States v. Ford*, 830 F.2d 596 (6th Cir. 1987), and *CBS v. Young*, 522 F.2d 234, 238 (6th Cir. 1975) (applying "clear and present danger" test to gag order in civil suit).[7] Numerous courts continue to rely on *Levine v. U.S. District Court*, 764 F.2d 590 (9th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986), *Bailey v. Systems Innovation, Inc.*, 852 F.2d 93 (3d Cir. 1988),[8] and *Chase v. Robson*, 435

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[6] *See, e.g.*, *News-Journal Corp.*, 939 F.2d at 1515 n.18 (noting, post-*Gentile*, continuing "division in circuit authority regarding the appropriate standard for evaluating restrictive orders imposed on trial participants"); *Dow Jones & Co., Inc. v. Kaye*, 90 F. Supp. 2d 1347, 1360 (S.D. Fla. 2000); *United States v. Hill*, 893 F. Supp. 1039, 1041 & n.1 (N.D. Fla. 1994) ("not[ing] the differing standards"); *State v. Bassett*, 911 P.2d 385, 388-89 (Wash. 1996); *Davenport v. Garcia*, 834 S.W.2d 4, 11 n.20 (Tex. 1992) ("confusing split of federal authority"); Erwin Chemerinsky, *Silence is Not Golden: Protecting Lawyer Speech Under the First Amendment*, First Amendment Handbook 1089, 1107 (1999) ("In the absence of guidance from the Supreme Court, lower courts have adopted several different standards for when gag orders on . . . parties are constitutionally permitted."); Denise R. Lind, *Media Rights of Access to Proceedings, Information and Participants in Military Criminal Cases*, 163 Mil. L. Rev. 1, 80 (2000) (noting "split in authority as to the standard of scrutiny applicable to gag orders").

[7] *Schledwitz v. United States*, 169 F.3d 1003, 1007 n.1 (6th Cir. 1999) (citing *Ford*); Proctor & Gamble v. Bankers Trust Co., 78 F.3d 219, 231 (6th Cir. 1996) (Brown, J., dissenting from opinion vacating gag order on press) (citing *Ford* and *CBS*); *Newell v. Brown*, 981 F.2d 880, 887 (6th Cir. 1992) (same), *cert. denied*, 510 U.S. 842 (1993); *see also Farley v. Farley*, 952 F. Supp. 1232, 1242 (M.D. Tenn. 1997) (citing *CBS*).

[8] The government errs in claiming (Opp. 12) that the *Bailey* standard "does not substantially differ" from the Fifth Circuit's "reasonable likelihood" standard. *Bailey* relied on "clear and present danger" cases to

F.2d 1059 (7th Cir. 1970) (per curiam).[9]

Finally, the government asserts that the supposed "paucity of recent case law" (Opp. 14) suggests that the circuit conflict "has not in practice had a substantial effect on the extent to which such restraints are imposed." *Id.* In fact, the numerous reported post-*Gentile* cases involving gag orders[10] confirm what numerous courts and respected academic commentators have noted: There has been an "increase in the number of gag orders on parties to ongoing

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apply the "clear threat" standard, plainly indicating the standards were identical. *See* 852 F.2d at 99-100 (citing *Wood v. Georgia*, 370 U.S. 375, 388 (1962) (applying "clear and present danger" standard); *Pennekamp v. Florida*, 328 U.S. 331, 347 (1946) (same)).

[9] *See, e.g.*, *Dow Jones*, 90 F. Supp. 2d at 1360 (citing *Levine* and *Bailey*); *Newfound Mgmt. Corp. v. Sewer*, 34 F. Supp. 2d 305, 315 (D.V.I. 1999) (relying on *Bailey* to assess gag order); *Koch v. Koch Indus.*, 6 F. Supp. 2d 1185, 1188 (D. Kan. 1998) (citing *Levine* and *Bailey*); *Anderson v. Virgin Islands*, 1996 U.S. Dist. LEXIS 22546, *25 (D.V.I. Oct. 16, 1996) (relying on *Bailey* to assess gag order); *Hill*, 893 F. Supp. at 1040-41 & n.1 (citing *Chase* and *CBS*); *Smith v. MCI Tel. Corp.*, 1993 U.S. Dist. LEXIS 6114, *9 (D. Kan. Apr. 28, 1993) (citing *CBS*); *Breiner v. Takao*, 835 P.2d 637, 641 (Haw. 1992) (citing *Chase*); *Hurvitz v. Hoefflin*, 84 Cal. App. 4th 1232, ---- n.6 (2000) (citing *Levine*); *Bassett*, 911 P.2d at 387 (citing *Levine*). The government's evident preference for discussing *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976), instead of *Chase* (Opp. 10), on which petitioner relied (Pet. 16-17), is doubtless explained by the fact that, because *Chase* involved a gag order on defendants and not on lawyers alone, it remains good law even after *Gentile*.

[10] *See* cases cited *supra* note 9; *see also News-Journal Corp.*, 939 F.2d 1499 (gag order on criminal defendants); *United States v. McVeigh*, 964 F. Supp. 313 (D. Colo. 1997) (lawyers and defendant); *United States v. Davis*, 902 F. Supp. 98 (E.D. La.) (criminal defendant), *aff'd*, 132 F.3d 1454 (5th Cir. 1997), *cert. denied*, 523 U.S. 1034 (1998); *Rodriguez v. Feinstein*, 734 So.2d 1162 (Fla. App. 1999) (civil litigants); *Davenport*, 834 S.W.2d 4 (civil litigants); *Keene Corp. v. Abate*, 608 A.2d 811, 815 (Md. Ct. Sp. App. 1992) (civil litigants; adopts "serious and imminent threat" standard).

litigation." *Davenport v. Garcia*, 834 S.W.2d 4, 11 n.20 (Tex. 1992).[11] The government's claim that the split has no practical consequences (Opp. 14) is remarkable in light of its concession below that the standard used by the Third, Sixth, Seventh, and Ninth Circuits is "nearly insurmountable" (Gov't C.A. Br. 23 n.17) and the conclusion of three Justices that the discrepancy between the two standards was of sufficient importance to warrant plenary review. *Dow Jones & Co. v. Simon*, 488 U.S. 946, 948 (1988) (White J., joined by Brennan and Marshall, JJ., dissenting from denial of certiorari). In fact, the choice of test is usually outcome-determinative. In cases applying the "clear and present danger" standard, the gag orders have failed; in cases applying the "reasonable likelihood" standard, they have passed muster.[12]

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[11] *Accord* Erwin Chemerinsky, *The Sound of Silence: Reflections on the Use of the Gag Order*, 17 Loy. L.A. Ent. L.J. 311, 312 (1997) ("trend towards gagging trial participants' speech"); Sheryl A. Bjork, Comment, "Indirect Gag Orders and the Doctrine of Prior Restraint," 44 U. Miami L. Rev. 165, 176 (1996) ("the past two decades have seen a proliferation of orders restraining trial participants").

[12] *Compare, e.g., In re Dow Jones & Co, Inc.*, 842 F.2d at 610 (finding gag order constitutional under "reasonable likelihood" standard); *In re Russell*, 726 F.2d 1007 (4th Cir.) (denying petition for mandamus under "reasonable likelihood" standard), *cert. denied*, 469 U.S. 837 (1984); *United States v. Tijerina*, 412 F.2d 661, 666 (10th Cir.) (finding gag order constitutional under "reasonable likelihood" standard), *cert. denied*, 396 U.S. 990 (1969); *with Ford*, 830 F.2d at 602 (striking down gag order under "clear and present danger" standard); *Levine*, 764 F.2d at 601 (striking down gag order under "serious and imminent threat" standard); *Chase*, 435 F.2d at 1061 (striking down gag order under "serious and imminent threat" standard); *Smith*, 1993 U.S. Dist. LEXIS 6114, *9-11 (gag order on civil litigants not satisfy "clear and present danger" standard). The government's suggestion that petitioner would not benefit from adoption of the higher standard (Opp. 10 n.2) is baseless. The court of appeals acknowledged that this case "presents a somewhat close call" (Pet. App. 11a) and the gag order was "somewhat

**3. The Fifth Circuit's Mere "Preference" for Explicit Factfinding is Fundamentally Inconsistent with First Amendment Law.** The government attempts to downplay the circuit conflict on the necessity of factfinding regarding less-restrictive alternatives by alleging that the difference in standards has no practical effect. Opp. 15-16. However, the government gives no reason why courts should not be taken at their word that each alternative to a gag order "*must* be explored and ultimately rejected as inadequate . . . before a [gag] order is entered." *In re Dow Jones & Co.*, 842 F.2d 603, 611 (2d Cir.) (emphasis added), *cert. denied*, 488 U.S. 946 (1988).[13] There is no reason to discount those categorical pronouncements in light of decisions by this Court and numerous others in analogous contexts insisting that trial courts make explicit factfindings about the availability of less-restrictive alternatives before imposing orders restricting First Amendment rights. *See, e.g.*, *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13-14 (1986) ("proceedings cannot be closed unless specific, on the record findings are made demonstrating" closure is necessary); *Washington Post v. Robinson*, 935 F.2d 282, 289 (D.C. Cir. 1991) (Wald, J., joined by Ruth Bader Ginsburg and D.H. Ginsburg, JJ.) (findings necessary to seal documents).

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broad" (*id.* 25a) even under the forgiving reasonable likelihood test. It would surely fail under the stricter standard.

[13] *Accord Bailey*, 852 F.2d at 99 ("specific factual findings supporting [the district court's] decision . . . are *essential* to any order restricting speech") (emphasis added); *accord State ex rel. The Missoulian v. Montana, 21st Dist. Court*, 933 P.2d 829, 841 (Mont. 1997) ("a gag order may issue *only* when . . . the [trial] court describes what reasonable alternatives have been considered and explains why those reasonable alternatives" are inadequate) (emphasis added); *State ex rel. NBC, Inc. v. Court of Common Pleas*, 556 N.E.2d 1120, 1125 (Ohio 1990) (reversing gag order "since no such specific findings were made").

**4. The Gag Order is Overbroad.** In contrast to the practice of other circuits, *see* Pet. 29-30, the district court made no attempt to limit speech restrictions to those "certain parts of this case" (Pet. App. 43a) that it considered to be prejudicial, and instead it prohibited any statement that "*could* interfere with a fair trial" (*id.* 51a), no matter how unlikely it would be to do so. The government's claim that this overbreadth argument is somehow procedurally defaulted (Opp. 18) is baseless. From the very outset, petitioner has argued that the gag order was not "'narrowly tailored' to limit only those statements that truly pose a serious and imminent threat to the fairness of a jury trial." Reply to Gov't Opp. to Motion to Lift Gag Order at 2. The district court passed on that argument (Pet. App. 46a) as did the court of appeals (*id.* 25a). That is enough. *United States v. Williams*, 504 U.S. 36, 41-45 (1992). The government's suggestion that a person can challenge the breadth of a gag order only if he first volunteers to submit to a less-restrictive one (Opp. 18) has no basis in law.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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